# LEGAL REASONING AND LEGAL WRITING

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# LEGAL REASONING AND LEGAL WRITING

## Tenth Edition

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In memory of Marjorie Batter Neumann
and Richard K. Neumann, Sr.

— RKN Jr.

For Melanie and Sanford Margolis

— EM

In memory of Jeanette M. Stanchi
and Edward J. Stanchi, Jr.

— KMS

The power of clear statement is the great power at the bar.

— Daniel Webster

*(also attributed to Rufus Choate,*
*Judah P. Benjamin, and perhaps others)*

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# Preface

We created this book to help students learn how to make professional writing decisions — to think simultaneously as lawyers and writers. As we say on page 3, a lawyer's life is a writer's life.

*Richard K. Neumann, Jr.*
*Ellie Margolis*
*Kathryn M. Stanchi*

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Richard Heuser, Carol McGeehan, Dana Wilson and their colleagues at Aspen and earlier at Little, Brown have had much insight into the qualities that make a text useful, and they caused this book to become a different and far better text than it otherwise would have been.

# LEGAL REASONING AND LEGAL WRITING

# LEGAL WRITING AND LAW

# Introduction to Law

## §1.1 Legal Writing Is Decisional Writing

Legal writing is different than many other kinds of writing. Before law school, you probably wrote to demonstrate your own knowledge through a college essay, or to entertain a reader through creative work. But lawyers write for a different reason — to guide decision-making.

A junior lawyer in a law firm might write an office memorandum to a senior lawyer explaining how the law affects a decision the senior lawyer must make. The memorandum's purpose is to help the senior lawyer make that decision. This is called *objective* or *predictive* writing.

In a courthouse, a lawyer might submit a motion memorandum or an appellate brief to persuade a judge or several judges to decide in favor of the lawyer's client. The document's purpose is to persuade each judge that the client's position is the legally preferrable one. This is called *persuasive* writing.

A lawyer's job is to analyze client problems by researching the law and identifying possible solutions, and explaining that analysis clearly in writing. And the audience of the lawyer's writing reads for the purpose of deciding.

## §1.2 Writing Skills Can Profoundly Affect a Lawyer's Career

A lawyer's life is a writer's life.

To a lawyer, words are professional tools. Everything depends on how well the lawyer uses words — speaking them, interpreting them, and writing them.

Law is "one of the principal literary professions" because "the average lawyer in the course of a lifetime does more writing than a novelist."[1]

Good writing skills are essential to a young lawyer looking for a job. Employers will use your writing sample to confirm that you have those skills. A person who supervised 400 lawyers at a major corporation put it this way: "You are more likely to get good grades in law school if you write well. You are more likely to become a partner in your law firm, or receive comparable promotions in your law department or government law office."[2] It really is true that "good writing pays well and bad writing pays badly."[3] The purpose of this book is to prepare you to be a professional legal writer.

## §1.3 Where Law Comes From

Law is primarily rules, which Chapters 2 and 3 explain in detail. Asking where law comes from is the same as asking who makes the rules.

Sources of law can be divided into two categories: one is statutes and statute-like provisions; the other is judge-made law.

**Statutes and statute-like provisions.** These are rules designed to apply to future problems. Legislatures create rules by enacting statutes. When we say, "There ought to be a law punishing people who text-message while driving," we vaguely imagine telling our state representative about the dangers of distraction behind the wheel and suggesting that she introduce a bill along these lines and persuade her colleagues in the legislature to enact it into law. If the legislature does that, and if the governor approves, the result is a statute. Statutes are enacted at the federal level by Congress and at the state level by individual state legislatures. Statute-like provisions include constitutions, administrative regulations, and court rules. They are not enacted by legislatures, but like statutes, are designed to apply to everyone and govern future behavior.

**Judge-made law.** Courts make law by resolving disputes between specific parties. Courts record their decisions in judicial opinions, which establish precedents. Lawyers use the words *cases*, *decisions*, and *opinions* interchangeably to refer to those precedents. Finding them is called *researching the case law*.

Courts make law in two ways. One is by interpreting statutes and statute-like provisions. Often we don't know what a statute means until the courts

1. William L. Prosser, *English as She Is Wrote*, 7 J. Leg. Educ. 155, 156 (1954).
2. Richard S. Lombard (formerly general counsel at Exxon), remarks reprinted in *Lost Words: The Economical, Ethical and Professional Effects of Bad Legal Writing*, Occasional Paper 7 of the ABA Section of Legal Educ. Admissions to the Bar, at 54 (1993).
3. Donald N. McCloskey, *The Writing of Economics* 2 (1987).

tell us through the judicial decisions that enforce it. When a court *interprets* the statute, it essentially finishes the legislature's job. The other method is by creating and changing the *common law*, which is entirely judge-made. It is important to know the difference between judicial decisions that interpret statutes or statute-like provisions and decisions that are purely judge made law. We will explore why in Chapter 7 when we discuss the hierarchy of law.

## §1.4 The Common Law

The common law, or purely judge made law, was created by judges to make decisions in the absence of statutory or constitutional law. Law-passing legislatures — the British Parliament, the U.S. Congress, and state legislatures — were all created centuries *after* the common law began. Before there were statutes, judges still had to resolve disputes. They did this by developing a body of law and figuring it out on a case-by-case basis, using prior similar cases to inform how to decide new ones, a process called *stare decisis* or "let stand that which has been decided." Under the doctrine of *stare decisis*, those precedents can bind other courts in circumstances explained in Chapter 7. You will see this process in action in your Torts and Property classes.

Although the common law is older, legislatures have the power to override it through statutes. The theory is that laws passed by the democratic process are more directly the "will of the people" than law made by judges who are not accountable to an electorate. If a legislature enacts a statute that directly contradicts a common law rule, the statute prevails, and the common law rule ceases to exist. Common law reasoning, however, permeates the practice and study of law.

## §1.5 Law's Vocabulary

To a lawyer, words are professional tools, and the law is full of specialized vocabulary, which you will learn to use. The law's jargon can be a bit alienating at first. Many of law's technical terms aren't from the English language; they're from Latin or from an old dialect called Norman Law French — or just Law French. It is part of the goal of the legal writing course to introduce you to the law's jargon and how to deal with it.

Law is filled with terms of art that express technical and specialized meanings, and a large proportion of these terms are from Latin or Norman Law French. Some of the more familiar examples include *allegation, appeal, arrest, assault, attorney, contract, counsel, court, crime, damages, defendant, evidence, felony, judge, jury, misdemeanor, plaintiff, slander, suit, tenant, tort,* and *verdict.* In the next few months, you'll also encounter *battery, damages, demurrer, devise, easement, estoppel, indictment, lien, livery of seisin,* and *replevin.*

In the course on Property, you'll soon become familiar with various types of *fees: fee simple absolute, fee simple conditional, fee simple defeasible, fee tail*. These aren't money paid for services. They're forms of property rights. Even today, these terms appear in the French word order (noun first, modifiers afterward).

Law has a huge vocabulary of technical terms. It is derived from three languages: English, French, and Latin. And law is impossible without its specialized use of words. Medicine is applied biology, and engineering is physics and math. But in law the exact meaning of a word can make the difference between winning a case and losing it.

Bottom line: It is imperative that you not assume that you know the *legal* meaning of a word even if you are confident you know its everyday English meaning. Some words or phrases obviously have a special meaning to lawyers, such as *parol evidence*, *habeas corpus*, and *res ipsa loquitur*. But others are deceptive. They might look like words you've seen many times before, but they mean something different in the law. Examples are *consideration*, *performance*, and *remedy*. One of the most common mistakes first year law students make is misuse of legal terms. You can usually avoid this by assiduously looking up every word or phrase that you do not recognize or that seems to be used in an unfamiliar way in a legal dictionary. Black's is the standard but there are many other good legal dictionaries online. An artificial intelligence like Chat GPT or Perplexity can also provide an accurate definition — but be careful. Although the AI models are rapidly advancing, as of this writing they still occasionally provide inaccurate information about legal terminology, so it is prudent to double check what you learn.

# Rule-Based Reasoning

## §2.1 The Inner Structure of a Rule

> At this moment the King, who had for some time been busily writing in his notebook, called out "Silence!" and read from his book, "Rule Forty-two. *All persons more than a mile high to leave the court.*"
> Everyone looked at Alice.
> "*I'm* not a mile high," said Alice.
> "You are," said the King.
> "Nearly *two* miles high," added the Queen.
>
> —*Lewis Carroll,*
> Alice in Wonderland

Law is made up of rules. A rule is a formula for making a decision.

Every rule has three components: (1) a set of *elements* (requirements), collectively called a test; (2) a result that occurs when all the elements are present (and the test is thus satisfied); and (3) a causal term that determines whether the result is mandatory, prohibitory, discretionary, or declaratory. (As you'll see in a moment, the result and the causal term are usually integrated into the same phrase or clause.) Additionally, many rules have (4) one or more exceptions that, if present, would defeat the result, even if all the elements are present.

Alice was confronted with a test of two elements. The first was the status of being a person. This is important because Alice was surrounded by a lot of animals, who may or may not have been subject to the rule about "persons."

This is an important first lesson about legal jargon: you may be surprised to learn that many statutes *define* what a person is, sometimes in ways that are not always obvious.[1] So, it is a good idea to double check the definition to see what "persons" mean because some or all of the animals might be covered! The second element went to height — specifically a height of more than a mile. The result would have been a duty to leave the court, because the causal term was mandatory ("*All* persons . . . *to* leave . . ."). No exceptions were provided for.

Alice has denied the second element (her height), impliedly conceding the first (her personhood). The Queen has offered to prove a height of nearly two miles. What would happen if the Queen were not able to make good on her promise and instead produced evidence showing only a height of 1.241 miles? (Read the rule.) What if the Queen were to produce no evidence and if Alice were to prove that her height was only 0.984 miles? (Read the rule.)

A causal term can be *mandatory*, *prohibitory*, *discretionary*, or *declaratory*. Because the causal term is the heart of the rule, if the causal term is, for example, mandatory, then the whole rule is, too.

| Type of Rule | What it Does | Typical Language | Consequence |
|---|---|---|---|
| Mandatory | Thou Shalt | Shall, Must | Legal Duty to Do the Thing |
| Prohibitory | Thou Shalt Not | Shall Not, May Not, Must Not, Prohibited, Forbidden | Legal Duty to NOT do the thing |
| Discretionary | Thou May if Thou Feels Like It | May, Has the Authority To | Has the legal authority to do the thing but it's optional |
| Declaratory | Here's some information that is true | Definitional | Now you have the information |

Below are examples of these types of rules. The examples come from the Federal Rules of Civil Procedure, which you'll study in your Civil Procedure course. (In law, rules are everywhere — in statutes, constitutions, regulations, and judicial precedents.)

If the rules below seem hard to understand at first, don't be discouraged. In a moment, you'll learn a method for taking rules like these apart to find their

1. *See* 18 U.S.C. § 2510(6) (2024) (defining "person" as, among other things, an individual, a political subdivision and a corporation).

meaning. For now, just read them to get a sense of how the four kinds of rules differ from each other. The key words in the causal terms have been italicized to highlight the differences.

**mandatory:** If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court *must* impose on the defendant (A) the expenses later incurred in making service and (B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.[2]

**prohibitory:** The court *must not* require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies, or on an appeal directed by a department of the federal government.[3]

**discretionary:** The court *may* assert jurisdiction over property if authorized by a federal statute.[4]

**declaratory:** There is one form of action — a civil action.[5]

Rules can be made up of *elements,* which are requirements all of which must be satisfied for compliance with the rule. Or they can be made up of *factors,* which do not all have to be satisfied, but instead require a balancing test. You can outline these different rules the same way, but *applying* them is different.

Here's a three-step method of figuring out what a rule means, using a rule with elements:

***Step 1:*** Break the rule down into its parts. List and number the elements in the test. Identify the causal term and the result. If there's an exception, identify it. If the exception has more than one element, list and number them as well. (Exceptions can have elements, too; an exception's element is something that must be present for the exception to operate.) In Step 1, *you don't care what the words mean*. You only want to know the *structure* of the rule. You're breaking the rule down into parts small enough to understand. Let's take the mandatory rule above and run it through Step 1. Here's the rule diagrammed:

2. Rule 4(d)(2) of the Federal Rules of Civil Procedure.
3. Rule 62(e) of the Federal Rules of Civil Procedure.
4. Rule 4(n)(1) of the Federal Rules of Civil Procedure.
5. Rule 2 of the Federal Rules of Civil Procedure.

**elements in the test:**

If

1. a defendant
2. located within the United States
3. fails to sign and return a waiver
4. requested by a plaintiff
5. located within the United States,

**causal term:**

the court must

**result:**

impose on the defendant (A) the expenses later incurred in making service and (B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses

**exception:**

unless the defendant has good cause for the failure.

You don't need to lay out the rule exactly this way — and you certainly don't need to use boxes. You can use any method of diagramming that breaks up the rule so you can understand it. The point is to break the rule up visually so that it's no longer a blur of words and so you can *see separately* the elements in the test, the causal term, the result, and any exception. When can you combine the causal term and the result? You can do it whenever doing so does not confuse you. If you can understand what's in the box below, you can combine, at least with this rule:

**causal term and result:**

the court must impose on the defendant (A) the expenses later incurred in making service and (B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses

***Step 2:*** Look at each of those small parts separately. Figure out the meaning of each element, the causal term, the result, and any exception. First, check to see whether the statute has a definitions section that defines any words. The Federal Rules of Civil Procedure do not have a separate definitional section like many statutes do, but they do occasionally define terms as we'll see below. When a statute or rule does not define a term, that means the *courts* have the power to define the terms, as those terms come up in cases before them. You can look the words up online or in a legal dictionary but be careful with this! Legal dictionaries are *general* definitions and may not provide the precise definition in your specific context. For example, "person" might mean one thing under the Uniform Commercial Code and another thing under the Model Penal Code. So, at this early stage, just make a note to check the judicial decisions for terms that are not defined in the statute or rules.

Take, for example, the phrase "a waiver requested by a plaintiff" in the rule. If you read the other subsections of this rule, you'll learn that a request for a waiver is a plaintiff's request that the defendant accept service by mail and *waive* (give up the right to) service by someone who personally brings the papers to the defendant. The surrounding materials also tell you that the expenses of service are whatever the plaintiff has to pay to have someone hired for the purpose of delivering the papers personally to the defendant.

***Step 3:*** Put the rule back together in a way that helps you *use* it. Sometimes that means rearranging the rule so that it's easier to understand. If when you first read the rule, an exception came at the beginning and the elements came last, rearrange the rule so the elements come first and the exception last. It will be easier to understand that way. For many rules — though not all of them — the rule's inner logic works like this:

> What events or circumstances set the rule into operation?
> (*These are the test's elements.*)
>
> When all the elements are present, what happens?
> (*The causal term and the result tell us.*)

Even if all the elements are present, could anything prevent the result? (*An exception, if the rule has any.*)

Usually, you can put the rule back together by creating a flowchart and applying the rule to the facts your professor gave you or using the facts of a case. A flowchart is essentially a list of questions. You'll be able to make a flowchart because of the diagramming you did earlier in Step 1. Diagramming the rule not only breaks it down so that it can be understood, but it also permits putting the rule back together so that it's easier to apply. The flowchart below comes straight out of the diagram in Step 1 above. (When you gain more experience at this, it will go so quickly and seamlessly that Steps 1, 2, and 3 *will seem to merge into a single step.*) Assume that Keisha wants Raymond to pay the costs of service.

**elements:**

1. Is Raymond a defendant?
2. Is Raymond located within the United States?
3. Did Raymond fail to comply with a request for waiver?
4. Is Keisha a plaintiff who made that request?
5. Is Keisha located within the United States?

It is sometimes helpful to use a "checkmark" system for the elements of a rule. Put a check next to all the elements that are satisfied and a "0" next to those that are not satisfied (or you can use yes/no or any other system that works for you). If the answers to all these questions are yes, then you know that the rule is triggered or satisfied and the court must impose the costs subsequently incurred in effecting service on Raymond — unless the exception applies.

**exception:**

Does Raymond have good cause for his failure to comply?

Step 3 helps you add everything up to see what happens when the rule is applied to a given set of facts. If all the elements are present in the facts, the court must order the defendant to reimburse the plaintiff for whatever the plaintiff had to pay to have someone hired for the purpose of delivering the papers personally to the defendant — unless good cause is shown.

How do you determine how many elements are in a rule? Think of each element as an integral fact, the absence of which would prevent the rule's operation. Then explore the logic behind the rule's words. If you can think of a reasonably predictable scenario in which part of what you believe to be one element could be true but part not true, then you have inadvertently combined two or more elements. For example, is "fail to comply with a request

for waiver" one element or two? If a defendant fails to comply with a request for some document other than a waiver, does the rule apply? Probably not, so perhaps these are two elements. On the other hand, maybe failure to comply and request for waiver are easy and clear elements that do not warrant their own separate analyses. They won't require lengthy analysis, just a check "yes" or "no." A good lesson is that often you cannot know the number of elements in a rule until you have consulted the cases interpreting it. Sometimes it makes sense to combine elements if the courts dispatch with the element easily and simultaneously. Take your cue from how the courts analyze the elements. For example, if "fail to comply" is clear and easy, and the courts tend to combine it with "request for waiver" then you can combine them too. But if "failure to comply" is complex and unclear, and the courts take space to analyze the element separately from "request for waiver," then it may make more sense to separate them.

**Rules with Factors.** Instead of elements, some rules have *factors*, which operate as criteria or guidelines. With elements, all elements are requirements to satisfy or trigger the operation of the rule. With factor rules, some of the factors might satisfy or trigger the rule even if other factors are missing. Often, we see factor rules in *balancing tests* or *totality tests*, where the court asks whether, as a whole, enough factors are present to trigger the rule. These types of rules are a little harder to work with because they involve more judgment and discretion on the part of the decisionmaker. Consider this example:

> In a hearing on a petition for termination of parental rights, the court shall consider the manifest best interests of the child. . . . For the purpose of determining the manifest best interests of the child, the court shall consider and evaluate all relevant factors, including, but not limited to:
>
> (1) Any suitable permanent custody arrangement with a relative of the child. . . .
>
> (2) The ability and disposition of the parent or parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under state law instead of medical care, and other material needs of the child.
>
> (3) The capacity of the parent or parents to care for the child to the extent that the child's safety, well-being, and physical, mental, and emotional health will not be endangered upon the child's return home.
>
> (4) The present mental and physical health needs of the child and such future needs of the child to the extent that such future needs can be ascertained based on the present condition of the child.
>
> (5) The love, affection, and other emotional ties existing between the child and the child's parent or parents, siblings, and other relatives, and the degree of harm to the child that would arise from the termination of parental rights and duties.

> (6) The likelihood of an older child remaining in long-term foster care upon termination of parental rights, due to emotional or behavioral problems or any special needs of the child.
>
> (7) The child's ability to form a significant relationship with a parental substitute and the likelihood that the child will enter into a more stable and permanent family relationship as a result of permanent termination of parental rights and duties.
>
> (8) The length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
>
> (9) The depth of the relationship existing between the child and the present custodian.
>
> (10) The reasonable preferences and wishes of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
>
> (11) The recommendations for the child provided by the child's guardian ad litem or legal representative.[6]

Only seldom would all of these factors tip in the same direction. With a rule like this, a judge does a balancing test, deciding according to the weight and number of factors that favor a particular result. You still need to outline the different factors, just like with an element test, but you will keep in mind that not all of them need to be present. So, you might conclude that the rule is triggered even if only half of the factors are present.

## §2.2 The Application of a Rule

> Welty and Lutz are students who have rented apartments on the same floor of the same building. At midnight, Welty is studying, while Lutz is playing avant-garde German opera at very high volume. Welty has put up with this for two or three hours, and finally she pounds on Lutz's door. Lutz opens the door about six inches, and, when he realizes that he cannot hear what Welty is saying, he steps back into the room a few feet to turn the volume down, without opening the door further. Continuing to express outrage, Welty pushes the door completely open and strides into the room. Lutz turns on Welty and orders her to leave. Welty finds this to be too much and punches Lutz so hard that he suffers substantial injury. In this jurisdiction, the punch is a felonious assault. Is Welty also guilty of common law burglary?

You might think the answer is "no," because intuitively this doesn't seem like the usual type of burglary. The stereotypical burglary, in most people's minds, is an intrusion into your home when you're not around and the burglar steals all the valuables. Maybe, you think, this is some kind of trespass.

6. Fla. Stat. § 39.810 (2006).

It's important to learn to interrogate these first impressions because they can be wrong. First, as noted above, until you gain more experience with the law, you shouldn't rely wholly on your instinct or your interpretation of the common meanings of words to make a *legal* judgment. Second, in law school, you must learn to supplement any answer with a sound *reason.* That reason will be based on the law, both statutory and case law, and the factual evidence. In the Welty case, as with any legal case, the answer can be determined only by applying a rule like the definition of common law burglary in the appropriate jurisdiction to the facts. *Anything else is a guess.*

Where do you start? Remember that a rule is a structured idea: The presence of all the elements causes the result, and the absence of any of them causes the rule not to operate. Assume that in our jurisdiction the elements of burglary are what they were at common law:

1. a breaking
2. and an entry
3. of the dwelling
4. of another
5. in the nighttime
6. with intent to commit a felony inside

To discover whether each element is present in the facts, simply annotate the list, noting, where appropriate, that you need to research the definitions that the courts attach to these terms. Your own personal definition of a "breaking" or an "entry" is irrelevant:

1. *a breaking:* If the courts define "breaking" as the enlarging of an opening between the door and the jam without permission, there was a breaking when Welty pushed the door open. Check the case law.
2. *and an entry:* Welty "entered" if the courts define walking into the room as an "entry" for purposes of common law burglary.
3. *of the dwelling:* Lutz's apartment is probably a dwelling, but check the case law.
4. *of another:* The facts seem to indicate that the dwelling was not Welty's.
5. *in the nighttime:* Midnight is probably in the nighttime, but check the case law.
6. *with intent to commit a felony inside:* We know from the hypothetical facts that the punch is felony assault. But did Welty *intend* to assault Lutz when she strode through the door? How do the courts define intent? How do we know what Welty was thinking when she strode through the door?

The bottom line is, the rule and its elements are only the beginning of your process of determining the answer to the legal question of whether Welty

committed a burglary. Even in this relatively simple case, the lawyer's process requires research, reading carefully, and deep thought. The case law might turn up a variety of results. Suppose that, although local precedent defines Welty's actions as a breaking and an entry, the cases on the sixth element strictly require evidence that a defendant had a fully formed felonious intent when entering the dwelling. That kind of evidence might be present, for example, where an accused was in possession of safecracking tools when he broke and entered, or where, before breaking and entering, the accused had told someone that he intended to murder the occupant. Against that background, the answer here might be something like the following: "Welty is not guilty of burglary because, although she broke and entered the dwelling of another in the nighttime, there's no evidence that she had a felonious intent when entering the dwelling."

Suppose, on the other hand, that under local case law Welty's actions again are a breaking and an entry; that the local cases don't require corroborative evidence of a felonious intent; and that local precedent defines a felonious intent for the purposes of burglary to be one that the defendant could have been forming — even if not yet consciously — when entering the dwelling. That might change your answer. But you might need to do more research to see how the courts determine what someone's intent is and what facts are required to prove it.

## §2.3 Some Things to Be Careful About with Rules

A rule might be expressed in many different ways. Where law is made through precedent — as much of our law is — different judges, writing in varying circumstances, may state the same rule in a variety of distinct phrasings. At times, it can be hard to tell whether the judges have stated the same rule in a different way or have stated a slightly different rule. This can make it challenging to identify exactly what the rule is or what the rules are.

Ambiguity and vagueness can obscure meaning unless the person stating the rule is particularly careful with language. A classic example asks whether a person riding a bicycle or a skateboard through a park violates a rule prohibiting the use of "vehicles." What had the rule-maker intended? How could the intention have been made clearer?

A rule usually doesn't express its purpose — or, as lawyers say, the policy underlying the rule. A rule's policy or purpose is the key to unravelling ambiguities. Is a self-propelled lawn mower a prohibited "vehicle"? Try to imagine what the rule-makers were trying to accomplish. Why did they create this rule? What harm were they trying to prevent, or what good were they trying to promote?

Not only is it difficult to frame a rule so that it controls all that the rule-maker wishes to control, but once a rule has been drafted, situations will

inevitably crop up that the rule-maker didn't contemplate or couldn't have been expected to contemplate. Would a baby carriage powered by solar batteries be a "vehicle"?

Finally, the parts of a rule may be so complex that it may be hard to pin down exactly what the rule is and how it works. And this is compounded by interaction between and among rules. A word or phrase in one rule may be defined, for example, by another rule. Or the application of one rule may be governed by yet another rule — or even a whole body of rules.

Two skills will help you become agile in the lawyerly use of rules. The first is language mastery, including an "ability to spot ambiguities, to recognize vagueness, to identify the emotive pull of a word . . . and to analyze and elucidate class words and abstractions."[7]

The second is the capacity to *think structurally*. A rule is a structured idea, and the rule's structure is more like an algebraic formula than a value judgment. You need to be able to figure out an idea's structure and apply it to facts.

## §2.4 Causes of Action and Affirmative Defenses

The law cannot remedy every wrong. Many problems are more effectively resolved through other means, such as the political process, mediation, bargaining, and economic and social pressure. Unless the legal system focuses its resources on resolving those problems it handles best, it would collapse under the weight of an unmanageable workload and would thus be prevented from attempting even the problem-solving it does well.

A harm the law will remedy is called a *cause of action* (or, in many courts, a *claim*). If a plaintiff proves a cause of action, a court will order a remedy unless the defendant proves an *affirmative defense.* If the defendant proves an affirmative defense, the plaintiff will get no remedy, even if that plaintiff has proved a cause of action. Causes of action and affirmative defenses (like other legal rules) are formulated as tests with elements and the other components, as explained in §2.1.

For example, where a plaintiff proves that a defendant intentionally confined him and that the defendant was not a law enforcement officer acting within the scope of an authority to arrest, the plaintiff has proved a cause of action called *false imprisonment.* The test is expressed as a list of elements: "False imprisonment consists of (1) a confinement (2) of the plaintiff (3) by the defendant (4) intentionally (5) where the defendant is not a sworn law enforcement officer acting within that authority." Proof of false imprisonment would customarily result in a court's awarding a remedy called *damages,* which obliges the defendant to compensate the plaintiff in money for the latter's injuries.

7. William L. Twining & David Miers, *How to Do Things with Rules* 120 (1976).

But that isn't always so: If the defendant can prove that she caught the plaintiff shoplifting in her store and restrained him only until the police arrived, she might have an affirmative defense that is sometimes called a *shopkeeper's privilege.* Where a defendant proves a shopkeeper's privilege, a court will not award the plaintiff damages, even if he has proved false imprisonment. The affirmative defense has its list of elements: "A shop-keeper's privilege exists where (1) a shopkeeper or shopkeeper's employee (2) has reasonable cause to believe that (3) the plaintiff (4) has shoplifted (5) in the shopkeeper's place of business and (6) the confinement occurs in a reasonable manner, for a reasonable time, and no more than needed to detain the plaintiff for law enforcement purposes."

Notice that some elements encompass *physical activity* ("a confinement"), while others specify *states of mind* ("intentionally") or address *status or condition* ("a shopkeeper or shopkeeper's employee") or require *abstract qualities* ("in a reasonable manner, for a reasonable time, and no more than needed to detain the plaintiff for law enforcement purposes"). State-of-mind and abstract-quality elements will probably puzzle you more than others will.

How will the plaintiff be able to prove that the defendant acted "intentionally," and how will the defendant be able to show that she confined the plaintiff "in a reasonable manner, for a reasonable time, and no more than needed to detain the plaintiff for law enforcement purposes"? Because thoughts and abstractions cannot be seen, heard, or felt, the law must judge an abstraction or a party's state of mind from the actions and other events surrounding it. If, for example, the plaintiff can prove that the defendant took him by the arm, pulled him into a room, and then locked the door herself, he may be able — through inference — to carry his burden of showing that she acted "intentionally." And through other inferences, the defendant may be able to carry her burden of proving the confinement to have been reasonably carried out if she can show that when she took the defendant by the arm, he had been trying to run from the store; that she called the police immediately; and that she turned the defendant over to the police as soon as they arrived.

## Exercise
## Rule 11 of the Federal Rules of Civil Procedure

Provisions from Rule 11 appear below. For each provision, decide whether it is mandatory, prohibitory, discretionary, or declaratory. Then diagram it. Finally, create a flowchart showing the questions that would need to be answered to determine when a court must strike a paper.

**Provision A** The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

**Provision B** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.

**Provision C** Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

**Provision D** This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

# 3 Issues, Facts, Precedents, and Statutes

## §3.1 A Precedents' Anatomy

An opinion announcing a court's decision — also called a *precedent* or, most commonly, a *case* — can include up to nine ingredients:

1. a description of procedural events (what lawyers and judges did before the decision was made)
2. a narrative of pleaded or evidentiary events (what the witnesses saw and the parties did *before* the lawsuit began)
3. a statement of the issue or issues to be decided by the court
4. a summary of the arguments made by each side
5. the court's holding on each issue
6. the rule or rules of law the court enforces through each holding
7. the court's reasoning
8. dicta
9. a statement of the relief granted or denied

Most opinions don't include all these things, although a typical opinion probably has most of them. Let's look at each.

Opinions begin with (1) a recitation of *procedural events* during the litigation that have raised the issue decided by the court. Examples are motions, hearings, trial, judgment, and appeal. Although the court's description of these events may — because of unfamiliar terminology — seem at first confusing, you must be able to understand them because the procedure in which an issue is raised determines the method a court will use to decide it. A court decides a motion for a directed verdict, for example, very differently from the way it

rules on a request for a jury instruction, even though both might require the court to consider the same point of law. The procedural events add up to the case's *procedural posture* at the time the decision was made.

Next, the court will describe (2) the *pleaded events* or the *evidentiary events* on which the ruling is based. In litigation, parties allege facts in a pleading and then prove them with evidence. The court has no other way of knowing what transpired between the parties before the lawsuit began. Both parties present the facts in a way that puts their case in the best possible light.

As you read the court's description of the pleadings and evidence, you can often tell, even before reading the rest of the opinion, which party's story persuaded the court. Stories persuade. Usually the court tells you, the reader, the same story that the winning lawyer told the court. An effective lawyer can tell an effective story through pleadings or evidence or both.

The court might also set out (3) a statement of the *issue or issues* before the court for decision and (4) a *summary of the arguments* made by each side. The court will then state, or at least imply, (5) the *holding* on each of the issues and (6) the *rule or rules of law* involved in each holding, together with (7) the *reasoning behind* — often called the *rationale for* — its decision. Somewhere in the opinion, the court might place some (8) *dicta.* You'll learn more about dicta in the next few months, but for the moment think of it as discussion unnecessary to support a holding and therefore not mandatory precedential authority.

An opinion usually ends with (9) a *statement of the relief granted or denied.* If the opinion is the decision of an appellate court, the relief may be an affirmance, a reversal, or a reversal combined with a direction to the trial court to proceed in a specified manner. If the opinion is from a trial court, the relief is most commonly the granting or denial of a motion.

An opinion announcing a court's decision is called *the court's opinion* or *the majority opinion.* If one or more of the judges involved in the decision don't agree with some aspect of the decision, the opinion might be accompanied by one or more *concurrences* or *dissents.* A concurring judge agrees with the result the majority reached but would have used different reasoning to justify that result. A dissenting judge disagrees with both the result and the reasoning.

Concurrences and dissents are themselves opinions, but they represent the views only of the judges who are concurring or dissenting. A concurrence or dissent will most likely focus on identifying issues and explaining the judge's reasoning, without the other components of the opinion.

Be an active and engaged reader to make sure you understand precedent. Lawyers read opinions carefully and with a critical eye. You cannot succeed in law school by reading passively.

Active and engaged reading includes pulling apart what's on the page and wringing meaning out of it. Consciously or unconsciously, active readers have silent dialogs with themselves about what they're reading. They ask themselves questions, which they try to answer while reading. For example:

"Why is the judge emphasizing this fact?"
*(This is active reading. A passive reader isn't curious.)*

"What does that phrase mean? How can I find out?"
*(A passive reader will skim over the phrase without trying to understand it.)*

"What's preventing me from understanding that paragraph?"
*(A passive reader will give up and ignore the paragraph.)*

Who's in charge — the reader or the page? For a passive reader, the page is in charge because the passive reader lets words hide their meaning. An active reader won't allow words to do that. An active reader silently interrogates until the words surrender and confess what they mean.

## Exercise I
## Dissecting the Text of *Roberson v. Rochester Folding Box Co.*

Read *Roberson v. Rochester Folding Box Co*. below and determine where (if anywhere) each ingredient occurs. Mark up the text generously and be prepared to discuss your analysis in class. Flag for further research every unfamiliar word as well as every familiar word that is used in an unfamiliar way. For the purposes of this assignment, you need not do any outside research; you can use a law dictionary to get a sense of what unfamiliar words mean.

The majority opinion in *Roberson* discusses — and disagrees with — one of the most influential articles ever published in an American law review: Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). Law reviews are periodicals that publish articles analyzing legal questions in scholarly depth. Almost every law review is sponsored by a law school and edited by students.

Like the cases reprinted in your casebooks for other courses, the version of *Roberson* printed here has been edited extensively to make it more readable. In casebooks and in other legal writing, certain customs are observed when quoted material is edited. Where words have been deleted, you'll see ellipses (strings of three or four periods). Where words have been added, usually to substitute for deleted words, the new words will be in brackets (squared-off parentheses).

## ROBERSON v. ROCHESTER FOLDING BOX CO.[1]

64 N.E. 442 (N.Y. 1902)[2]

PARKER, Ch. J. [The defendant demurred] to the complaint . . . upon the ground that the complaint does not state facts sufficient to constitute a cause of action. [The courts below overruled the demurrer.]

[We must decide] whether the complaint . . . can be said to show any right to relief either in law or in equity. [We hold that it does not show any right to relief.]

The complaint alleges that the Franklin Mills Co., one of the defendants, was engaged . . . in the manufacture and sale of flour; that before the commencement of the action, without the knowledge or consent of plaintiff, defendants, knowing that they had no right or authority so to do, had obtained, made, printed, sold and circulated about 25,000 lithographic prints, photographs and likenesses of plaintiff . . . ; that upon the paper upon which the likenesses were printed and above the portrait there were printed, in large, plain letters, the words, "Flour of the Family," and below the portrait in large capital letters, "Franklin Mills Flour," and in the lower right-hand corner in smaller capital letters, "Rochester Folding Box Co., Rochester, N.Y."; that upon the same sheet were other advertisements of the flour of the Franklin Mills Co.; that those 25,000 likenesses of the plaintiff thus ornamented have been conspicuously posted and displayed in stores, warehouses, saloons and other public places; that they have been recognized by friends of the plaintiff and other people with the result that plaintiff has been greatly humiliated by the scoffs and jeers of persons who have recognized her face and picture on this advertisement and her good name has been attacked, causing her great distress and suffering both in body and mind. . . .

[The] portrait . . . is said to be a very good one, and one that her friends and acquaintances were able to recognize; indeed, her grievance is that a good portrait of her, and, therefore, one easily recognized, has been used to attract attention toward the paper upon which defendant mill company's advertisements appear. Such publicity, which some find agreeable, is to plaintiff very distasteful, and thus, because of defendants' impertinence in using her picture without her consent for their own business purposes, she has been caused to suffer mental distress where others would have appreciated the compliment . . . implied in the selection of the picture for such purposes; but as it is distasteful to her, she seeks the aid of the courts to enjoin a further circulation of the lithographic prints containing her portrait made as alleged in the complaint, and as an incident thereto, to reimburse her for the damages to her feelings, which the complaint fixes at the sum of $15,000.

1. The case name is composed by separating the last names of the parties with a "v." In a case with multiple plaintiffs or defendants, the name of only the first listed per side appears in the case name. That's why the *Roberson* opinion mentions two defendants, but only one appears in the case name.

2. This is the legal *citation* to *Roberson*. Note that it is comprised of: the case name, the volume number of the reporter, the reporter in which the case is printed, the first page of the case and then in parentheses, the decision-making court and the year of the decision.

There is no precedent for such an action to be found in the decisions of this court. . . . Nevertheless, [the court below] reached the conclusion that plaintiff had a good cause of action against defendants, in that defendants had invaded what is called a "right of privacy" — in other words, the right to be let alone. Mention of such a right is not to be found in Blackstone, Kent or any other of the great commentators upon the law, nor so far as the learning of counsel or the courts in this case have been able to discover, does its existence seem to have been asserted prior to about the year 1890, when it was [theorized] in the Harvard Law Review . . . in an article entitled, "The Right of Privacy."

The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise. . . .

If such a principle be incorporated into the body of the law through the [process of judicial precedent], the attempts to logically apply the principle will necessarily result, not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established [through judicial precedent], cannot be confined to the restraint of the publication of a likeness but must necessarily embrace as well the publication of a word-picture, a comment upon one's looks, conduct, domestic relations or habits. [Thus, a] vast field of litigation . . . would necessarily be opened up should this court hold that privacy exists as a legal right enforceable in equity by injunction, and by damages where they seem necessary to give complete relief.

The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent. In such event, no embarrassment would result to the general body of the law, for the rule would be applicable only to cases provided for by the statute. The courts, however, being without authority to legislate, are . . . necessarily [constrained] by precedents. . . .

So in a case like the one before us, which is concededly new to this court, it is important that the court should have in mind the effect upon future litigation and upon the development of the law which would necessarily result from a step so far outside of the beaten paths of both common law and equity [because] the right of privacy as a legal doctrine enforceable in equity has not, down to this time, been established by decisions.

The history of the phrase "right of privacy" in this country seems to have begun in 1890 in a clever article in the Harvard Law Review — already referred to — in which a number of English cases were analyzed, and, reasoning by analogy, the conclusion was reached that — notwithstanding the unanimity of the courts in resting their decisions upon property rights in cases where publication is prevented by injunction — in reality such prevention was due to the necessity of affording protection to . . . an inviolate personality, not that of private property. . . .

. . . Those authorities are now to be examined in order that we may see whether they were intended to and did mark a departure from the established rule which had been enforced for generations; or, on the other hand, are entirely consistent with it.

The first case is *Prince Albert v. Strange* (1 Macn. & G. 25; 2 De G. & S. 652). The queen and the prince, having made etchings and drawings for their own amusement, decided to have copies struck off from the etched plates for presentation to friends and for their own use. The workman employed, however, printed some copies on his own account, which afterwards came into the hands of Strange, who purposed exhibiting them, and published a descriptive catalogue. Prince Albert applied for an injunction as to both exhibition and catalogue, and the vice-chancellor granted it, restraining defendant from publishing . . . a description of the etchings. [The] vice-chancellor . . . found two reasons for granting the injunction, namely, that the property rights of Prince Albert had been infringed, and that there was a breach of trust by the workman in retaining some impressions for himself. The opinion contained no hint whatever of a right of privacy separate and distinct from the right of property. . . .

[In similar ways, the other English cases cited in the Harvard article do not actually support a common law cause of action for invasion of privacy.] In not one of [them] was it the basis of the decision that the defendant could be restrained from performing the act he was doing or threatening to do on the ground that the feelings of the plaintiff would be thereby injured; but, on the contrary, each decision was rested either upon the ground of breach of trust or that plaintiff had a property right in the subject of litigation which the court could protect. . . .

[Of the American cases offered in support of a common law right to privacy, none actually does so when the decisions are examined in detail.] An examination of the authorities [thus] leads us to the conclusion that the so-called "right of privacy" has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided. [Thus, there is no common law right of privacy in New York.]

The judgment of the Appellate Division and of the Special Term [is] reversed. . . .

Gray, J. (dissenting). . . . These defendants stand before the court, admitting that they have made, published and circulated, without the knowledge or the authority of the plaintiff, 25,000 lithographic portraits of her, for the purpose of profit and gain to themselves; that these portraits have been conspicuously posted in stores, warehouses and saloons, in the vicinity of the plaintiff's residence and throughout the United States, as advertisements of their goods; that the effect has been to humiliate her . . . and, yet, claiming that she makes out no cause of action . . . .

Our consideration of the question thus presented has not been foreclosed by the decision in *Schuyler v. Curtis,* (147 N.Y. 434). In that case, it appeared that the defendants were intending to make, and to exhibit, at the Columbian Exposition of 1893, a statue of Mrs. Schuyler, . . . conspicuous in her lifetime for her philanthropic work, to typify "Woman as the Philanthropist" and, as a companion piece, a statue of Miss Susan B. Anthony, to typify the "Representative Reformer." The plaintiff, in behalf of himself, as the nephew of Mrs. Schuyler, and of other immediate relatives, sought by the action to

restrain them from carrying out their intentions as to the statue of Mrs. Schuyler; upon the grounds, in substance, that they were proceeding without his consent, . . . or that of the other immediate members of the family; that their proceeding was disagreeable to him, because it would have been disagreeable and obnoxious to his aunt, if living, and that it was annoying to have Mrs. Schuyler's memory associated with principles, which Miss Susan B. Anthony typified and of which Mrs. Schuyler did not approve. His right to maintain the action was denied and the denial was expressly placed upon the ground that he, as a relative, did not represent any right of privacy which Mrs. Schuyler possessed in her lifetime and that, whatever her right had been, in that respect, it died with her. The existence of the individual's right to be protected against the invasion of his privacy, if not actually affirmed in the opinion, was, very certainly, far from being denied. "It may be admitted," Judge Peckham observed, when delivering the opinion of the court, "that courts have power, in some cases, to enjoin the doing of an act, where the nature, or character, of the act itself is well calculated to wound the sensibilities of an individual, and where the doing of the act is wholly unjustifiable, and is, in legal contemplation, a wrong, *even though the existence of no property,* as that term is usually used, *is involved in the subject.*" . . .

[The majority misinterprets both the English and the American precedents.] Security of person is as necessary as the security of property; and for that complete personal security, which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society, there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purposes or gain. The proposition is, to me, an inconceivable one that these defendants may, unauthorizedly, use the likeness of this young woman upon their advertisement, as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity.

Such a view, as it seems to me, must have been unduly influenced by a failure to find precedents in analogous cases . . . ; without taking into consideration that, in the existing state of society, new conditions affecting the relations of persons demand the broader extension of . . . legal principles. . . . I think that such a view is unduly restricted, too, by a search for some property, which has been invaded by the defendants' acts. Property is not, necessarily, the thing itself, which is owned; it is the right of the owner in relation to it. . . . It seems to me that the principle, which is applicable, is analogous to that upon which courts of equity have interfered to protect the right of privacy, in cases of private writings, or of other unpublished products of the mind. The writer, or the lecturer, has been protected in his right to a literary property in a letter, or a lecture, against its unauthorized publication; because it is property, to which the right of privacy attaches. . . . I think that this plaintiff has the same property in the right to be protected against the use of her face for defendant's commercial purposes, as she would have, if they were publishing her literary compositions. The right would be conceded, if she had sat for her photograph; but if her face, or her portraiture, has a value, the value is hers exclusively; until the use be granted away to the public. . . .

O'Brien, Cullen and Werner, JJ., concur with Parker, Ch. J.; Bartlett and Haight, JJ., concur with Gray, J.[3]

## §3.2 The Interdependence of Facts, Issues, and Rules

Some facts are in an opinion only to provide background, continuity, or human interest to what would otherwise be a tedious and disjointed recitation. Of the remaining facts, some are merely related to the court's thinking, while others *caused* the court to come to its decision. This last group is called *determinative facts* or *essential facts.* They are essential to the court's decision because they determined the outcome. If the facts had been different, the decision would have been different.

The determinative facts lead to the rule of the case — the rule of law for which the case stands as precedent. The most important goal of case analysis is discovering and understanding the rule (or rules) that govern the outcome of the case.

Identify determinative facts by asking the following question: *If a particular fact had not happened, or if it had happened differently, would the court have made a different decision?* If so, that fact is one of the determinative facts. Consider the following nonlegal example: Assume that a rental agent has just shown you an apartment and that the following facts are true:

A. The apartment is located half a mile from the law school.
B. It's a studio apartment (one room plus a kitchenette and bathroom).
C. The building appears to be well maintained and safe.
D. The apartment is on the third floor, away from the street, and the neighbors do not appear to be disagreeable.
E. The rent is $500 per month, furnished.
F. The landlord will require a year's lease, and if you don't stay in the apartment for the full year, subleasing it to someone else would be difficult.
G. You have a widowed aunt, with whom you get along well and who lives alone in a house 45 minutes by bus from the law school, and she has

3. *Roberson* is a great example of how the law makes false starts as it grows. The 1890 Harvard Law Review article to which Judge Parker refers was written by Louis Brandeis, who was later appointed to the U.S. Supreme Court, and Samuel Warren, who was Brandeis's law partner at the time the article was published. Brandeis and Warren argued that the common law should recognize a new cause of action for tortious invasion of privacy. In *Roberson,* the New York Court of Appeals refused to do so. But eventually courts in other states — virtually all of them after *Roberson* — did adopt Brandeis and Warren's cause of action. But public opinion supported the plaintiff, Abigail Roberson, and later, the New York legislature enacted a statute specifically written to overrule the Court's decision. It's a great lesson in how unjust legal decisions can be changed in our system.

offered to let you use the second floor of her house during the school year. The house and neighborhood are safe and quiet, and the living arrangements would be satisfactory to you.

H. You have made a commitment to work next summer in El Paso.

I. You neither own nor have access to a car.

J. Reliable local people have told you that you probably won't find an apartment that is better, cheaper, or more convenient than the one you've just inspected.

Which facts are essential to your decision? If the apartment had been two miles from the law school (rather than a half-mile), would your decision be different? If the answer is no, the first listed fact couldn't be determinative. It might be part of the factual mosaic and might explain why you looked at the apartment in the first place, but you wouldn't base your decision on it. (Go through the listed facts and mark in the margin whether each would determine your decision.)

Facts recited specifically in an opinion can sometimes be reformulated generically. In the hypothetical above, for example, a generic restatement of fact *G* might be the following: "You have a rent-free alternative to the apartment, but the alternative would require 45 minutes of travel each way plus the expense of public transportation." This formulation is generic because it would cover other possibilities that would have the same effect. It could include, for example, the following, seemingly different, facts: "You're a member of the clergy in a religion that has given you a leave of absence to attend law school; you may continue to live rent-free in the satisfactory quarters your religion has provided, but to get to the law school, you will have to walk 15 minutes and then ride a subway for 30 minutes more, at the same cost as a bus."

A rule of law is a principle that governs how a particular type of decision is to be made — or, put another way, how certain types of facts are to be treated by the official (such as a judge) who must make a decision. When the court states the rule ambiguously, you can state it more specifically using the determinative facts. There's room for interpretive maneuvering wherever you could reasonably interpret the determinative facts narrowly (specifically) or broadly (generically).

Notice how different formulations of a rule can be extracted from the apartment example. A narrow formulation might be the following:

> A law student who has a choice between renting an apartment and living in the second floor of an aunt's house should choose the aunt's house where the apartment's rent is $500 per month but the aunt's second floor is free except for bus fares; where the student must work in El Paso during the summer; and where it would be difficult to sublease the apartment during the summer.

Because this formulation is limited to the specific facts given in the hypothetical, it could directly govern only a tiny number of future decision-makers. It would not, for example, directly govern the member of the clergy described above, even if she will spend next summer doing relief work in Rwanda.

Although a decision-maker in a future situation might be able to reason by analogy from the narrow rule set out above, a broader, more widely applicable formulation, stated generically, would directly govern *both* situations:

> A student should not sign a year's lease where the student cannot live in the leased property during the summer and where a nearly free alternative is available.

The determinative facts, the issue, the holding, and the rule are all dependent on each other. In the apartment hypothetical, if the issue were different — say, "How shall I respond to an offer to join the American Automobile Association?" — the selection of determinative facts would also change. (In fact, the only determinative one would be fact I*:* "You neither own nor have access to a car.") You'll often find yourself using what the court tells you about the issue or the holding to fill in what the court hasn't told you about the determinative facts, and vice versa.

For example, if the court states the issue but doesn't identify the rule or specify which facts are determinative, you might discover the rule and the determinative facts by answering the following questions:

1. Who is suing whom over what series of events and to get what relief?
2. What issue does the court say it intends to decide?
3. How does the court decide that issue?
4. On what facts does the court rely in making that decision?
5. What rule does the court enforce?

In answering the fifth question, use the same kind of reasoning we applied to the apartment hypothetical: Develop several different phrasings of the rule (broad, narrow, middling) and identify the one the court is most likely to have had in mind.

## Exercise II
## Analyzing the Meaning of *Roberson v. Rochester Folding Box Co.*

What was the issue on appeal in *Roberson*? What rule did the appellate court enforce? What were the determinative facts?

## §3.3 The Anatomy of a Statute

The *Roberson* decision was so unpopular that the following year the New York legislature enacted a statute providing exactly the relief that the *Roberson* court held was unavailable under the common law. The *Roberson* majority understood that that might happen. Recall the majority's words: "The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent." The statute has been amended several times. Here is its current form:

### New York Civil Rights Law §§ 50 – 51

#### § 50. Right of Privacy

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person . . . is guilty of a misdemeanor.

#### § 51. Action for Injunction and for Damages

Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided [in § 50] may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by [§ 50], the jury, in its discretion, may award exemplary damages. . . .

A statute expresses rules the legislature has enacted. It does nothing else. Unlike judicial opinions, statutory text on its face contains no stories. Usually a statute does not explain the legislature's reasoning. Typically the explanations are in other documents, such as legislative committee reports. Most statutes are pure rules, structured as Chapter 2 describes. Sometimes those rules are straightforward, like the one in § 50 above. Sometimes they are convoluted like the one in § 51.

### Exercise III
### Analyzing the Meaning of §§ 50 and 51 of the New York Civil Rights Law

Reading §§ 50 and 51 together as a single statute, what do they prohibit or require? If a person subject to New York law were to violate this prohibition or requirement, what might be the consequences? In what ways did §§ 50 and 51 change the rule of *Roberson*?

## §3.4 How Statutes and the Common Law Interact

The Court of Appeals held in *Roberson* that no common law right to privacy of any kind existed in New York. Many other states do recognize common law privacy rights, and the common law has grown to include four separate invasion of privacy torts. *Intrusion upon seclusion* is invasion of a person's private space — for example, by opening his mail or by spying through his windows with binoculars. *Public disclosure of private facts* is the dissemination of facts that don't legitimately concern the public and that are sufficiently private that a reasonable person would consider their disclosure highly offensive. *False light* is the dissemination of facts that, even if true, create a misleading and highly offensive impression about a person. *Appropriation of name or likeness* is what happened to Abigail Roberson.

Section 51 of the New York Civil Rights Law created a statutory cause of action for appropriation. But no legislation in New York has created a statutory cause of action for intrusion, public disclosure of private facts, or false light.

Because the legislature created a statutory cause of action *only* for appropriation, *Roberson* is still the law in New York on the other three invasion of privacy torts. If a plaintiff sues in New York for intrusion, public disclosure of private facts, or false light, that plaintiff will lose. A court will hold that those common law torts don't exist in New York, citing *Roberson*, and that New York recognizes only appropriation.

A statute does only what its words express. Sections 50 and 51 are narrowly drafted, and they only create a misdemeanor and a cause of action for appropriation. The following case illustrates that.

### COSTANZA V. SEINFELD
181 Misc. 2d 562, 693 N.Y.S.2d 897
(Sup. Ct., N.Y. County 1999)

Harold Tomkins, J.

A person is seeking an enormous sum of money for claims that the New York State courts have rejected for decades. This could be the plot for an episode in a situation comedy. Instead, it is the case brought by plaintiff Michael Costanza

who is suing the comedian, Jerry Seinfeld, Larry David (who was the cocreator of the television program "Seinfeld"), the National Broadcasting Company, Inc. and the production companies for $100 million. He is seeking relief for violation of New York's Civil Rights Law §§ 50 and 51. . . .

The substantive assertions of the complaint are that the defendants used the name and likeness of plaintiff Michael Costanza without his permission, that they invaded his privacy, [and] that he was portrayed in a negative, humiliating light. . . . Plaintiff Michael Costanza asserts that the fictional character of George Costanza in the television program "Seinfeld" is based upon him. In the show, George Costanza is a long-time friend of the lead character, Jerry Seinfeld. He is constantly having problems with poor employment situations, disastrous romantic relationships, conflicts with his parents and general self-absorption.

. . . Plaintiff Michael Costanza points to various similarities between himself and the character George Costanza to bolster his claim that his name and likeness are being appropriated. He claims that, like him, George Costanza is short, fat, bald, that he knew Jerry Seinfeld from college purportedly as the character George Costanza did and they both came from Queens. Plaintiff Michael Costanza asserts that the self-centered nature and unreliability of the character George Costanza are attributed to him and this humiliates him.

The issues in this case come before the court [through] a preanswer motion to dismiss. . . . [P]laintiff Michael Costanza's claims for being placed in a false light and invasion of privacy must be dismissed. They cannot stand because New York law does not and never has allowed a common-law claim for invasion of privacy, *Howell v. New York Post Co.*, 81 N.Y.2d 115 (1993); *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135 (1985). As the New York Court of Appeals explained,

> While legal scholarship has been influential in the development of a tort for intentional infliction of emotional distress, it has had less success in the development of a right to privacy in this State. In a famous law review article written more than a century ago, Samuel Warren and Louis Brandeis advocated a tort for invasion of the right to privacy. . . . Relying in part on this article, Abigail Marie Roberson sued a flour company for using her picture, without consent, in the advertisement of its product (Roberson v. Rochester Folding Box Co., 171 N.Y. 538). Finding a lack of support for the thesis of the Warren-Brandeis study, this Court, in a four to three decision, rejected plaintiff's claim.
>
> The *Roberson* decision was roundly criticized. . . . The Legislature responded by enacting the Nation's first statutory right to privacy (L. 1903, ch. 132), now codified as sections 50 and 51 of the Civil Rights Law. Section 50 prohibits the use of a living person's name, portrait or picture for "advertising" or "trade" purposes without prior written consent. . . . Section 50 provides criminal penalties and section 51 a private right of action for damages and injunctive relief.

*Howell* at 122-123. In New York State, there is [still] no common law right to privacy, *Freihofer v. Hearst Corp.* at 140, and any relief must be sought under the statute.

The court now turns to the assertion that plaintiff Michael Costanza's name and likeness are being appropriated without his written consent. This claim faces several separate obstacles. First, defendants assert that plaintiff Michael Costanza has waived any claim by [personally] appearing on the show. [This defense fails because the] statute clearly provides that written consent is necessary for use of a person's name or likeness, *Kane v. Orange County Publs.*, 232 A.D.2d 526 (2d Dept. 1996). However, defendants note the limited nature of the relief provided by Civil Rights Law §§ 50 and 51. It extends only to the use of a name or likeness for trade or advertising, *Freihofer v. Hearst Corp.*, at 140. The sort of commercial exploitation prohibited and compensable if violated is solicitation for patronage, *Delan v. CBS, Inc.*, 91 A.D.2d 255 (2d Dept. 1983). In a case similar to this lawsuit involving the play "Six Degrees of Separation," it was held that "works of fiction and satire do not fall within the narrow scope of the statutory phrases 'advertising' and 'trade,'" *Hampton v. Guare*, 195 A.D.2d 366 (1st Dept. 1993). The Seinfeld television program was a fictional comedic presentation. It does not fall within the scope of trade or advertising. . . .

Plaintiff Michael Costanza's claim for violation of Civil Rights Law §§ 50 and 51 must be dismissed. . . .

# INTRODUCTION TO LEGAL WRITING

# 4 Predictive Writing

## §4.1 How Predictive Writing Differs from Persuasive Writing

Predictive writing and persuasive writing are *decisional*, but in different ways. In predictive writing, you help your reader — a supervising lawyer, or your client — make a decision. In persuasive writing, you try to convince a judge to decide a case in favor of your client.

**Predictive writing:** A newspaper might ask its lawyer whether an article it wants to publish would make the newspaper liable for defamation, which is the tort of communicating damaging falsehoods about a person. The article describes certain people in unflattering ways, and the newspaper worries about whether it has gone too far. The newspaper might ask, "Is the article defamatory?" That's the same as asking, "If we publish the article, is a court likely to hold us liable for defamation?" It is quite difficult — and ill-advised — to predict *with certainty* that a court will decide in a particular way. So what lawyers do is: research the law, apply the law's definition of defamation to the article, and use their judgment to try to predict what a court would do. We, as lawyers, presume that a court would likely hold the newspaper liable for defamation if the article meets the requirements for defamation. Sometimes we get it right, but sometimes we don't. Law isn't a science, and while some cases are clear and straightforward, other cases can be close calls. As lawyers, we do our best to read the law, apply it, and recommend advising the client as if courts will follow the law.

The newspaper asks the question so it can decide whether to publish the article. If the lawyer says the article is defamatory, the newspaper might ask a follow-up question: "How can the article be changed so that it isn't

defamatory?" The lawyer might answer, "It won't be defamatory if you delete the fourth sentence." The lawyer predicts to help the client make a decision.

After the article is published, a person mentioned in it consults her lawyer and asks what her rights are. Regardless of how the client phrases the question, she is really asking, "If I sue the newspaper, will a court award me damages for defamation?" The lawyer's prediction will help her decide whether to sue.

Predictive writing is neutral and objective. If the client is likely to lose, good predictive writing should say that, even though the client will be disappointed. The best service you can give your client is to state your prediction honestly and accurately, and sometimes that means delivering bad news.

**Persuasive writing:** Here a lawyer explains to a court why it should make rulings the lawyer's client wants. Persuasive writing is advocacy. Unlike objective memo writing, good persuasive writing *influences* the court to decide in favor of the lawyer's client. We'll talk much more about persuasive writing in later chapters.

## §4.2 The Documents Lawyers Write

Predictive writing is often done in office memoranda (Chapter 16), professional emails (Chapter 17), and client letters (Chapter 18).

Persuasive writing is often done in trial court motion memoranda (Chapter 28) and in appellate briefs (Chapter 29). Chapters 23 through 26 explain how to make persuasive arguments and tell a client's story persuasively in writing.

Many skills are common to both predictive and persuasive writing. They include working with statutes, cases, and other authority (Chapters 7–9); working with facts (Chapter 10); organizing written analysis (Chapters 11–14); as well as paragraphing, style, and quoting (Chapters 20–22).

Lawyers write a wide range of other documents as well: contracts, wills, pleadings, motions, interrogatories, affidavits, stipulations, judicial opinions, orders, judgments, statutes, administrative regulations, and more. But those documents usually aren't covered in a first-year writing course.

## §4.3 How to Predict

> The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.
>
> — *Oliver Wendell Holmes*

Let's take up Welty's facts from Chapter 2. Here they are again:

> Welty and Lutz are students who have rented apartments on the same floor of the same building. At midnight, Welty is studying, while Lutz is listening to

avant-garde German opera at a very high volume. Welty has put up with this for two or three hours, and finally she pounds on Lutz's door. Lutz opens the door about six inches, and, when he realizes that he cannot hear what Welty is saying, he steps back into the room a few feet to turn the volume down, without opening the door further. Continuing to express outrage, Welty pushes the door completely open and strides into the room. Lutz turns on Welty and orders her to leave. Welty finds this to be too much and punches Lutz so hard that he suffers substantial injury. In this jurisdiction, the punch is a felonious assault. Is Welty also guilty of burglary?

(Before continuing here, you should review §2.1 in Chapter 2 on how legal rules are structured.)

Assume that in your state the crime of common law burglary has been codified and renamed "burglary in the first degree":

*Criminal Code § 102:* A person commits burglary in the first degree by breaking and entering the dwelling of another in the nighttime with intent to commit a felony inside.

Also assume that the elements of burglary in the first degree have been statutorily defined as follows:

*Criminal Code § 101(c):* A "breaking" is the making of an opening, or the enlarging of an opening, so as to permit entry into a building, or a closed off portion of a building, if neither the owner nor the occupant has consented thereto.

*Criminal Code § 101(d):* An "entering" or an "entry" is the placing, by a defendant, of any part of his body or anything under his control within a building, or a closed off portion of a building, if neither the owner nor the occupant has consented thereto.

*Criminal Code § 101(e):* A "closed off portion" of a building is one divided from the remainder of the building by walls, partitions, or the like so that it can be secured against entry.

*Criminal Code § 101(f):* A "dwelling" is any building, or any closed off portion thereof, in which one or more persons habitually sleep.

*Criminal Code § 101(g):* A dwelling is "of another" if the defendant does not by right habitually sleep there.

*Criminal Code § 101(h):* "Nighttime" is the period between sunset and sunrise.

*Criminal Code § 101(k):* "Intent to commit a felony inside" is the intent to commit, while inside a building or closed off portion of a building, a crime classified in this Code as a felony, but only if the defendant had that intent at the moment the defendant broke and entered.

And assume that the legislature has also enacted the following:

*Criminal Code § 11:* No person shall be convicted of a crime except on evidence proving guilt beyond a reasonable doubt.

*Criminal Code § 403:* An assault causing substantial injury is a felony.

Finally, assume — for the sake of simplicity — that none of these sections has yet been interpreted by any court, and that you are therefore limited to the statute itself. That is exceedingly rare. As noted in Chapter 2, you will always attempt to research what courts say about the statutory language. But doing so here would make the chapter very long and complicated. So, the asterisks next to the conclusions in the chart are there to remind us to check the case law.

If you were Welty's lawyer and must advise Welty about whether she committed first-degree burglary, you might make a chart to organize your initial thoughts.

First-degree burglary has six elements and no exceptions. Welty has committed first-degree burglary if her actions meet all the elements. I'll make a list of the elements and annotate it by writing next to each element the relevant facts. At this point, of course, many of the check marks are probable — not certain — and depend on what the courts say about the elements. This is just a start.

| Elements | Any definitions or additional rules | Facts related to that element | Current thinking: Is the yes/no element satisfied or not? |
|---|---|---|---|
| Breaking | Making or enlarging an opening without consent of owner/ occupant § 101(c) | Welty pushed door open<br>Lutz/owner did not agree to let her in | Probably ✓* |
| Entering | Putting any part of the body in a building without consent § 101(d) | Welty walked in<br>Lutz/owner did not agree to let her in | Probably ✓* |
| Dwelling | Building where people habitually sleep § 101(f) | It's an apartment; Lutz will testify he sleeps there | Yes ✓ |
| Of Another | Defendant does not sleep there § 101(g) | Welty doesn't sleep there | Yes ✓ |
| Nighttime | Time between sunset and sunrise | It was midnight | Yes ✓ |
| With intent to commit felony | Intent to commit "at the moment" of entry § 101(k) | Welty was angry when she entered, but she will testify that she found Lutz's ordering her to leave to be "too much." | Probably not but *See what facts courts say would prove "at the moment" |

Now that you have an idea of what your prediction is, you are ready to write. Your first draft might look something like this. Pay careful attention to the organization. We'll talk more about that in later chapters.

Welty has likely not committed first degree burglary.

Under § 102 of the Criminal Code, the elements of first degree burglary are (1) breaking and (2) entering (3) the dwelling (4) of another (5) in the nighttime (6) "with intent to commit a felony inside."

Under § 11, a defendant can be convicted only "on evidence proving guilt beyond a reasonable doubt."

Although Welty broke and entered Lutz's dwelling in the nighttime, and although the assault she committed there is classified as a felony by § 403, the evidence is insufficient to show, beyond a reasonable doubt, that she had the intent to assault Lutz when she broke and entered.

**Breaking and Entering without Consent**

Welty's pushing open Lutz's apartment door was a breaking. A breaking is "the making of an opening, or the enlarging of an opening, so as to permit entry into a building, or a closed off portion of a building, if neither the owner nor the occupant has consented thereto." § 101(c). A "closed off portion" of a building" is a space "divided from the remainder of the building by walls, partitions, or the like so that it can be secured against entry." § 101(e). Lutz's apartment is therefore likely a closed off portion of a building. Welty pushed open the door after Lutz opened it just a few inches.

Welty's walking into Lutz's apartment was an entry. An entry is "the placing, by a defendant, of any part of his body or anything under his control within a building, or a closed off portion of a building, if neither the owner nor the occupant has consented thereto." § 101(g). Welty walked into Lutz's apartment.

This is your bottom-line conclusion.

Section 102 is the basic rule governing the dispute.

Section 11 operates together with § 102. This is a roadmap sentence telling the reader the route your analysis will follow.

Headings help provide rest stops for the reader and "chunk" the information for the reader's ease.

Note that this organization considers the elements that are satisfied before the key element that is not met. That is a judgment call. Some writers would start with the dispositive element — the one on which the whole conclusion depends. Here, that is the intent element. Other writers, though, would proceed in the same order as the statute, for ease and consistency.

Why bother to consider the other elements at all? Your job when writing up an analysis for your reader is to give the reader — often a lawyer with more experience — the

Neither Lutz nor the owner of the building consented to either Welty's breaking or entering. Lutz's opening of the door six inches is probably not consent for entry. And his prompt order for Welty to leave shows that he had not consented to Welty's breaking or entrance. Finally, nothing suggests that Welty had consent for either the breaking or the entering from the landlord who owns the apartment.

**Dwelling of Another in the Nighttime**

Lutz's apartment is a dwelling. A dwelling is "any building, or closed off portion thereof, in which one or more persons habitually sleep." § 101(f). Lutz will testify that he habitually sleeps in his apartment.

To Welty, that apartment is the dwelling of another because she does not habitually sleep there. *See* § 101(g). Finally, these events happened at midnight, which is between sunset and sunrise. *See* § 101(m).

**Intent to Commit a Felony**

Welty probably did not intend to commit a felony. "Intent to commit a felony inside" requires that "the defendant had that intent at the moment the defendant broke and entered." § 101(k). Although Welty was angry when she entered, she says that she found his ordering her out to be "too much" and punched him after entering. These facts suggest that she entered the apartment to complain and, after she was already in the room, decided to punch him. Nothing Welty said or did show that "the moment" she walked through the door, she intended to punch Lutz.

opportunity to evaluate your reasoning and conclusions and come to her own independent judgment. That's a key purpose of a predictive memorandum! So, you need to include all the elements, even the ones you think are easily satisfied, so that she can evaluate whether she thinks that analysis is correct.

Notice how the paragraphs are structured to flow from conclusion to rule to explanation. This is a natural sequence in legal writing. State your conclusion. Then state the rule. Then apply the rule to the facts. Later chapters in this book expand that sequence and explain how to make it work.

These elements are so straightforward that it is unnecessary to elaborate. You have made the excellent judgment call not to waste your reader's time with excess material she doesn't need. Your analysis must mention them because they are required elements, but the mention should be quick to leave room for more complicated and disputed elements.

## Exercises
## Nansen and Byrd

**Exercise A.** With the aid of §§ 16 and 221(a) of the Criminal Code (below), break down the rule in § 220 into a list of elements and exceptions. Annotate the list by adding definitions for the elements (and for any exceptions you might come across). Under each element you list, leave lots of white space. When you do the second part of this exercise, you will need room to write more.

> *Criminal Code § 16:* When a term describing a kind of intent or knowledge appears in a statute defining a crime, that term applies to every element of the crime, unless the definition of the crime clearly indicates that the term is meant to apply only to certain elements and not to others.
>
> *Criminal Code § 220:* A person is guilty of criminal sale of a controlled substance when he knowingly sells any quantity of a controlled substance.
>
> *Criminal Code § 221(a):* As used in section 220 of this code, "sell" means to exchange for goods or money, to give, or to offer or agree to do the same, except where the seller is a licensed physician dispensing the controlled substance pursuant to a permit issued by the Drug Enforcement Commission, or where the seller is a licensed pharmacist dispensing the controlled substance as directed by a prescription issued by a licensed physician pursuant to a permit issued by the Drug Enforcement Commission.

**Exercise B.** You've interviewed Nansen, who lives with Byrd. Neither is a licensed physician or a licensed pharmacist. At about noon on July 15, both were arrested and charged with criminal sale of a controlled substance. Nansen has told you the following:

> Byrd keeps a supply of cocaine in our apartment. He had been out of town for a month, and I had used up his stash while he was gone. I knew that was going to bend Byrd completely out of shape, but I thought I was going to get away with it. I had replaced it all with plaster. When you grind plaster down real fine, it looks like coke. For other reasons, I had decided to go to Alaska on an afternoon flight on July 15 and not come back. Byrd was supposed to get back into town on July 16, and by the time he figured out what had happened, I'd be in the Tongass Forest.
>
> But on the morning of the 15th, Byrd opened the door of the apartment and walked in, saying he had decided to come back a day early. I hadn't started packing yet — I wouldn't have much to pack anyway — but I didn't know how I was going to pack with Byrd standing around because of all the explaining I'd have to do. I also didn't want Byrd hanging around the apartment and working up an urge for some cocaine that wasn't there. So I said, "Let's go hang out on the street."
>
> We had been on the sidewalk about ten or fifteen minutes when a guy came up to us and started talking. He was dressed a little too well to be a regular street person, but he looked kind of desperate. I figured he was looking to buy some drugs. Then I realized that that was the solution to at least some of my problem.

> I took Byrd aside and said, "This guy looks like he's ready to buy big. What do you think he'd pay for your stash?" Byrd looked reluctant, so I turned to the guy and said, "We can sell you about three ounces of coke, but we have to have a thousand for it." When the guy said, "Yeah," Byrd said, "Wait here," and ran inside the apartment building. A thousand was far more than the stuff was worth.
>
> Byrd walked out onto the stoop with the whole stash in his hand in the zip-lock bag he kept it in. While he was walking down the steps, about ten feet away from me and the guy who wanted to buy, two uniforms appeared out of nowhere and arrested Byrd and me.

The "guy" turned out to be Officer D'Asconni, an undercover policeman who will testify to the conversation Nansen has described. The police laboratory reports that the bag contained 2.8 ounces of plaster and 0.007 ounces of cocaine. When you told Nansen about the laboratory report, he said the following:

> I didn't think there was any coke in that bag. What they found must have been residue. I had used up every last bit of Byrd's stuff. I clearly remember looking at that empty bag after I had used it all and wondering how much plaster to put in it so that it would at least look like the coke Byrd had left behind. I certainly didn't see any point in scrubbing the bag with cleanser before I put the plaster in it.

With the aid of Criminal Code § 221(b) (below), finish annotating your list of elements by writing, under each element, the facts that are relevant to that element.

> *Criminal Code § 221(b):* As used in section 220, "controlled substance" includes any of the following: . . . cocaine. . . .

**Exercise C.** You've been asked to determine whether Nansen or Byrd is likely to be convicted of criminal sale of a controlled substance. The question isn't whether Nansen or Byrd criminally sold a controlled substance, but whether either of them is likely to be convicted of doing that. To make that prediction, take into account § 10(a) of the Criminal Code.

> *Criminal Code § 10(a):* No person shall be convicted of a crime except on evidence proving guilt beyond a reasonable doubt.

Using your annotated outline of elements, decide whether each element can be proved beyond a reasonable doubt, and whether any exceptions are satisfied. Then make your prediction. Finally, decide the order in which the elements would best be explored in the Discussion section of an office memo.

# Inside the Writing Process

## §5.1 Product and Process

A writing course teaches both the *product* created through writing, and the *process* of creating it.

Your product — the document you produce — might be an office memo, a motion memo for a trial court, a client letter, a professional email, or a brief filed in an appellate court. Every type of document has its own purposes and characteristics. Later chapters in this book explain what each type of document should look like and what it should accomplish.

Your writing process is how you go about creating a legal document — what goes through your mind as you write. Part of that is analyzing the law, perhaps by interpreting statutes and precedent, which involves several aspects of thinking like a lawyer. The other part is thinking like a writer: how you organize your thoughts and find the best words to express them, as well as how you manage the work and, in general, perform the act of creation. Later chapters explain legal analysis. This chapter and Chapter 6 explain some basics of how writers think and work.

Process is harder to learn than product. Product is tangible. It can be held in the hand. A sample office memo, like the one in Appendix C, can be discussed in class to learn what makes it effective or ineffective. Process is much harder to observe because it happens mostly in your mind when you're alone. And there are many different effective processes of writing. If you put 50 best-selling book authors in one room and ask them how they write, they'll probably give you 50 different answers.

Moreover, artificial intelligence and large language models are rapidly changing what the legal drafting process looks like. Many of these models can help make the organizing and drafting process more efficient. They can

also help new lawyers get over the challenge of the blank screen by offering a starting draft or outline. And they are constantly evolving, so that in the time between the publication of this book and your reading it, the models will likely have evolved to be even more sophisticated. For right now, however, AI can do some things well but other things very poorly. Lawyers should use AI to be more efficient for their clients but should *always* check and verify what AI has produced. We have endeavored throughout this book to highlight where AI might be useful to streamline and lower costs for clients. But please know that because of its rapid evolution, some of this advice may be outdated by the time the book hits the shelves.

A process that works for one writer won't necessarily work for another. The descriptions of the legal drafting process in this book can give you a starting point for how to approach the writing process. As you get more experience, you will figure out what works best for your own process.

As you work through your first legal drafting assignment, take note of how you did things and in what order. Think about what seemed to make the process easier, and what made it frustrating. Don't be afraid to experiment. What did you do first? Second? Did you feel ready to write? How did you organize your materials? What did you do when you felt stuck? Afterward, ask yourself some more questions. Which aspects of your process seemed to work well? Which seemed inefficient or counterproductive? Some questions are much more important than you might imagine. What do *you like about yourself* as a writer, both in what you produced and in how you produced it? Is there anything about the work that you *enjoyed*? In §6.7, we'll explain why what you like and enjoy are important questions.

## §5.2 Five Phases of Writing

We outline here five basic phases of writing, but know that this is barebones and, as noted above, as you gain more experience, you will make adjustments. We've also noted where AI might be useful additions to the basic tools.

1. Researching authorities and analyzing what you find (§5.4)
2. Organizing your raw materials into an outline (§5.5)
3. Producing a first draft (§5.6)
4. Rewriting it through several more drafts (§5.7)
5. Polishing it (§5.8)

Very few lawyers go through these phases in strict order, finishing one phase before beginning the next. Rarely, if ever, do they start at the beginning, write until they get to the end, and then stop.

Instead, legal writers often circle back to reopen something already done and redo some aspect of it. For example, you'll continue to analyze while you

organize, while you write the first draft, and while you rewrite it several times, although much of the analytical work comes at the beginning. While writing the first draft, you might decide to go back and rewrite something you wrote a few pages ago. While rewriting, you might reorganize.

Still, it helps to think about writing in the five phases listed above. Each phase is a different *kind* of work, requiring somewhat different skills.

## §5.3 Planning the Work

Suppose your teacher distributes an assignment with a deadline for submitting your work that is three weeks in the future. On the day you receive the assignment, you have two options.

The first is to toss it aside when you get home so you can try not to think about it for at least two weeks, leaving only the last few days before the deadline to do the entire job. While this works for many college students, it doesn't work in law school, because legal writing requires much more preparation and many more drafts than most students anticipate. This is especially true because the word or page limits might seem very short compared to what students are accustomed to writing. But shorter is not easier; in fact, many students find themselves spending a great deal of time trying to pare their writing down to be at or under the limit.

When you're learning professional skills, each new task will usually take longer to accomplish than you might think, because the complexities of the task are not immediately apparent. Later, with experience, you'll get much better at predicting how long it will take to get things done.

The better option is to use the full three weeks to get the job done and start early! Create a schedule:

1. Try to estimate how much time it will take you to do the research and analyze the results, to organize your raw materials, to produce a first draft, to rewrite it through several more drafts, and to polish it; and
2. budget time so that you can do each one of these tasks well.

Whatever time you come up with, multiply it by two or three. It is going to take longer than you think. When you first get the assignment, it can seem huge and intimidating. But once you break it down into a group of smaller tasks, it's not as big and seems much more doable. Anne Lamott, a writer by profession, remembers when her brother, who was not yet a teenager, had been assigned to write a school report on birds —

> and he was at the kitchen table close to tears, surrounded by binder paper and pencils and unopened books on birds, immobilized by the hugeness of the task

> ahead. Then my father [also a writer by profession] sat down, put his arm around my brother's shoulder, and said, "Bird by bird, buddy. Just take it bird by bird."[1]

Although you're not writing about birds, you can use the same approach. Divide the document into parts. Take it part by part. Write one part. Then maybe step away for a bit. Then write another. Keep going until you've written everything. The prospect of writing a big legal document can seem paralyzing. But it's manageable to write several shorter chunks that, added together, form the document. That's several smaller tasks, not one huge one.

## §5.4 Researching and Analyzing

Begin by identifying the issues. What questions about law and facts need to be resolved? As you research, analyze, and write, you may change your mind about the precise definitions of these questions. And while working you may identify sub-issues not apparent at the outset. But start researching and analyzing.

Researching is finding relevant authority, such as statutes and cases. Your teacher has probably assigned a research textbook or other materials that explain how to research. Analysis is identifying the authorities on which you rely (Chapter 7), figuring out what they mean (Chapters 8 and 9), and how they govern the client's facts (Chapter 10). It helps to outline the rules of law (Chapter 2).

## §5.5 Organizing Raw Materials into an Outline

Good organization is crucial in legal writing. Legal writing is a highly *structured* form of expression because rules of law are by nature structured ideas. Good organization makes your analysis more easily understandable to the reader by leading the reader through the steps of your reasoning.

Let the law guide your organization. The structure of a rule controls how you organize its application to facts — and thus controls the organization of a written discussion of the rule and its application. All that work we did in the last few chapters dissecting rules is the starting point to good legal organization.

Legal writing is highly (some would say rigidly) structured compared to many other kinds of writing. The reason is that your job as a legal writer is to make your reader's job easier. And lawyers and judges have expectations about organization. Good legal writers meet those expectations. Poorly organized legal documents are easy for the *writer* but foist the work of organizing upon

1. Anne Lamott, *Bird by Bird* 19 (1994).

the *reader*. Particularly if you are writing to a supervisor, the last thing you want to do is give her more work when she hired you to make her job *easier*.

Some legal writers outline and others do not. As a new legal writer, we recommend trying to outline. If you dislike outlining, the problem might be that you were taught an outlining method that is unnecessarily rigid. Rigid methods of outlining demand that you draw an outline tree with roman numerals, capital letters, Arabic numerals, lowercase letters, and italic numerals. That represses creativity, and it isn't the way effective writers plan their writing in detail.

A fluid outlining method is simpler and *helps* you write. A fluid outline is a flexible collection of lists. Your raw materials (statutes, cases, facts, hypotheses, and so on) flow through it and into your first draft. For many writers, it is easier to do a word dump and *then* outline. You will discover what works best for you, but the bottom line is that you cannot skip the organizational step. It can happen earlier or later, but it must happen.

This is a place where AI models or LLMs might be able to help. Some of them, including the newer versions on Lexis and Westlaw, allow you to upload materials. You could upload your notes, a very rough draft, or something else, and ask AI to organize it. But as with any task you outsource to AI, you must be a *critical evaluator* of what AI produces. It is a starting point, not an ending point.

Several chapters in this book explain how to outline and how to organize. Chapter 11 sets out the most effective methods of organizing analytical legal writing. Chapters 12 and 13 explore those methods in further detail. And Chapter 14 explains how to make a fluid outline.

## §5.6 Producing a First Draft

> Just know that everyone's writing is terrible. Until it's not. No one's stuff is right immediately. You gotta work it. Refine it. Shape it. Spend some time with it.
>
> —*Ava DuVernay*

> Start by getting something—anything—down on paper. A friend of mine says that the first draft is the down draft—you just get it down. The second draft is the up draft—you fix it up. . . . And the third draft is the dental draft, where you check every tooth. . . .
>
> —*Anne Lamott*

Many students treat the first draft as the most important part of writing. It is important, but not the only important stage of legal writing. Additionally, first-draft writing might not be separate from rewriting because you may be constantly rewriting as you go.

The primary purpose of a first draft is to get things down on the page so you can start rewriting. It can also help to quell anxiety, which can be the bane of legal writers. Once you have *something* to work with, you can breathe. A first draft accomplishes its entire purpose merely by existing. It can be full of errors. In fact, one of the bigger mistakes novice legal writers make is trying to get the draft perfect the first time. This is a recipe for writer's block and anxiety. Just write with the knowledge that, if you've taken our advice and given yourself enough time, you *now* can start rewriting and editing. See Chapter 6 for tips on overcoming writer's block.

Do your first draft as early as possible. We cannot emphasize this enough. You will want to leave ample time for rewriting. That is where a lot of the magic happens.

## §5.7 Rewriting

> There is no such thing as good writing. There is only good rewriting.
>
> — *Justice Louis Brandeis*

> A scrupulous writer, in every sentence that he writes, will ask . . . : What am I trying to say? What words will express it? What image or idiom will make it clearer? . . . Could I put it more shortly?
>
> — *George Orwell*

A first draft is for the writer. You write to get your thoughts onto the page.

Later drafts are for the reader. In rewriting, you continue to develop your thinking, getting more thoughts onto the page while deleting weak ideas. But your focus shifts to the reader. How much will *this* reader need to be told? Will this reader understand what you say without having to read twice? Will this reader become convinced that you're right?

To answer these questions while you read your first and later drafts, pretend to be your reader — the one described in Chapter 4. This is particularly hard for new law students because we are asking you to read like a lawyer when you are just learning how to write law. Remember when we talked earlier about being an active reader? You will want to do that with your first draft. Ask hard questions. Why did I include this? Why didn't I include this other thing? Why did I choose this organization?

One of the things most new law students have to learn is that everything in legal writing is deliberate. Only the first draft should be just "how it came out" of your head. The rewriting should evince a series of careful, well-considered decisions about the document.

One reason to start early is that you can evaluate your draft more effectively if you step away from it for a bit. One famous novelist describes putting aside

a draft for the night only to read it in the morning and wonder if she'd had too much to drink. This happens to all of us — what looked amazing at 8 PM can look awful the next morning. Try to accept that as part of the process. You wouldn't be able to write a better sentence if you hadn't written that awful one. If you start too late, you'll hand in that draft that looks amazing, but really isn't.

Even experienced lawyers — the good ones — draft and redraft important documents. Beginning lawyers need to go through even more drafts than experienced lawyers do. You will get better at it as you work at it. Yes, it can be frustrating, but every learning process that is worthwhile is a little frustrating. Try to think of those frustrations as akin to the sore muscles you get from working out. It's how you get better.

We recommend *focused* rewriting. If you just look through the document to spot things that don't look good or right, you will miss a lot. Instead, take one task at a time. Maybe first you look at the overall organization. Then maybe you look at the organization within particular sections of the document. Don't limit yourself to "surface-level changes," but instead use rewriting as "an opportunity to re-see" the whole document.[2]

Even experienced lawyers can get frustrated at the rewriting process. Sometimes you see that a part of the draft just won't work and you have to redo it. That's no fun for anyone. But it is part of the lawyer's life. And, rest assured, when you finally get it right, that feeling can be exhilarating. "The pleasure of revision [another name for rewriting] often arises when you refine what you intend to say and *even discover that you have more to say, a new solution, a different path, a better presentation.*"[3] Empirical studies of the writing process have shown that experienced writers use rewriting for deep rethinking, and usually they reorganize the earlier draft.[4]

Don't be afraid to delete material from your first draft, even if it hurts to take it out. Many new legal writers think that if they delete something, that is wasted work. It isn't! You needed to write that section to come to the understanding that it wasn't necessary to your analysis. If it makes you feel better, you can create a document to store all those deleted words. One of the authors of this text does that with everything she writes because she finds that it makes it easier to delete material. She knows she can get it back if it truly belongs in the document and her work isn't really gone. It's just been relocated. Or that's what she tells herself.[5]

While rewriting, use the checklists on the inside front and back covers of this book to test your writing for good organization, paragraphing, style, and

2. Patricia Grande Montana, *Better Revision: Encouraging Students to See Through the Eyes of the Legal Reader*, 14 J. Legal Writing 291, 292 (2008).

3. Christopher M. Anzidei, *The Revision Process in Legal Writing: Seeing Better to Write Better,* 8 J. Legal Writing 23, 44 (2002) (italics added).

4. *Id.* at 40.

5. That said, she does delete the folder (usually called something like "trash from Evans memo") eventually. Like after the case is over but not one minute before. Thank goodness for iCloud.

proper use of quotations. You can give these checklists (or really any checklist) to an AI or LLM and ask it to check for the listed items. It will not be perfect, but it may flag things you might have missed. You can also use a style program like Grammarly or Hemingway editor (free as of this writing).

To experience what the reader will experience, some writers read their drafts out loud. When they hear themselves speaking a draft's words, they are better able to imagine how the same words will strike the reader for whom they're writing. Other writers can get the same effect without speaking because they've developed the ability to "hear" a voice saying the words they read. Reading a draft aloud can also alert you to wording problems. Bad phrasing often sounds terrible when you say it.

Eventually, while putting the writing through several drafts, you'll notice that after a certain point, the problems you find are mostly typographical errors and small matters of grammar, style, and citation. When that happens, you've moved from rewriting into polishing (see the next section in this chapter), and the project is nearly finished.

Don't confuse rewriting with polishing. If all you do after the first draft is fix typographical errors, awkward wording, grammatical errors, and errors in citation form, you're polishing, and you've skipped rewriting completely.

## §5.8 Polishing

This is the last phase. Allow a day or more to pass before coming back to the writing to polish it. If you're away from it for at least a day, you'll come back fresh and be able to see things you'd otherwise miss.

Read through the document differently from the way you've been seeing it on the screen as you wrote. Print it out. Readers and writers often see problems on a printed page that aren't obvious on a computer screen. Read it aloud. If it *sounds* awkward, it is awkward. If you work sitting down, read it standing up or lying down. Put the draft in an obnoxious font or print it on colored paper. Do something that puts you in a different frame of mind while you review your writing.

Take one last look for wording that doesn't say clearly and unambiguously what you mean. This is the biggest reason for waiting at least a day. When you wrote the words, they seemed clear because at that moment you knew what you were trying to say. But after some time has passed, you're no longer in that frame of mind. If you're not sure what the words mean, or what you intended them to mean, fix them.

And take one last look for wording to be tightened up. Can you say it equally well in fewer words? If you can, do so.

Look for typographical errors, awkward wording, grammatical errors, and errors in citation form. Does the formatting make the document attractive to

read? If not, choose a different font (but one that looks professional), add white space so the document doesn't seem crowded, or find other ways to make it look attractive. Here again, AI or LLM models, or online grammar or style programs, can be immensely helpful. Are they a substitute for your own good judgment? Not yet. But they can point out things that you might have missed. And, at least as of this writing, most AI models are not very good at proper legal citation. They'll probably get better, but for now, it's probably more efficient to just do the citation check on your own.

Finally, make sure the pages are numbered. Professional documents generally do not number the first page and start numbering on page two with the number 2. But check the rules for your class, law firm, or organization.

Now, you're finished.

# 6 More About Writing

## §6.1 Writing and Thinking Are One Process

> [T]here is no better way to master an idea than to write about it.
>
> —*Robert H. Frank*

> I write to discover what I think.
>
> —*Daniel Boorstin*

*Writing and thinking are one process.* Writing enriches thought. You can't write without rethinking what you're trying to say. Writing and rewriting *help* you think.

Try to let go of the idea that writing is the *end product.* It is, but it is also the first step. As you write, you may change your mind. Most writers have abandoned ideas that seemed fine when first thought about, sounded good when spoken, but proved faulty when—in the end—they "wouldn't write." If you feel that an idea is "too hard" to write, it is never a bad idea to listen to that voice. It might be that the idea needs to be modified or even abandoned.

Most writers have experienced the reverse as well: sitting down to write with a single idea and finding that the act of writing draws the idea out, fertilizes it, causes it to sprout limbs and roots, and spread into a forest of ideas.

You will likely have both experiences in legal writing, because both are part of writing as a way of developing your thinking.

## §6.2 Your Readers

You are writing mostly for professionals, who have expectations that you might not be used to.

**Decisional reading and decisional writing.** Your documents will be read by judges and supervising lawyers who must make decisions based on what you have written. They won't read out of general curiosity. They are reading because they need to know or learn something. Each reader will expect your document to explain everything she needs to know in order to make a wise decision.

**Skepticism.** Your readers are skeptical by nature and for good reason. Skepticism helps them make better decisions. Part of thinking like a lawyer is approaching any idea with a healthy skepticism. What you are learning to do is be critical of your own writing and ideas so that others find fewer weaknesses.

**Time pressure.** Your readers are busy people who work under great time pressure. In law, time is money. Your employers need your writing to be so concise and crystal clear that they can read it just once and, in that one reading, learn from you everything they need to know. If reading your writing takes too long or is confusing, you will have wasted their time and cost them money. For judges, if your writing is poor or confusing, they likely will stop reading it. You will have lost the opportunity to persuade them.

**Credibility and details.** While it is important for your ideas and your analysis to be excellent, little details matter to the reader's perception. Legal readers will expect correct grammar, clear sentences, no typographical errors, and proper citation form. Multiple studies have shown that these seemingly small details have a great impact on the reader's evaluation of the document — *and the writer.*[1]

1. Julie Boland & Robin Queen, *Why Grammar Mistakes in a Short Email Could Make Some People Judge You,* The Conversation, April 19, 2016, https://theconversation.com/why-grammar-mistakes-in-a-short-email-could-make-some-people-judge-you-57168 (grammar errors, even in a short email, made people judge the writer as less intelligent and trustworthy) (citing leading studies in various contexts).

## §6.3 Voice and Professional Tone

*Voice* is a personal quality in a person's writing—something that speaks from the page in a writer's own way. Legal writing requires a professional tone, which is generally more formal, impartial, and authoritative than other forms of writing.

Writing tone is similar to speaking tone, with different levels of formality depending on the audience. Documents filed in court, such as motion memos and briefs, are probably more formal than anything you wrote before law school. Client letters and emails to supervisors can be somewhat informal but not chatty. Office memoranda are somewhere in the middle, although the degree of formality can differ from firm to firm.

For example, contractions, acronyms, or even slang words can be fine in some legal documents but not in others. It depends on context and audience. Bottom line: You should carefully assess, perhaps by looking at other similar documents at your firm or organization, what tone is expected and conform to it.

This is another place that artificial intelligence models might be helpful. With some versions of AI, you can give an example document to it and ask it to match the tone in your document. Even if your version of AI does not allow you to upload documents, you can ask AI to make the tone more formal, more casual, or more persuasive. Of course you will want to review AI's work. One of us asked an AI model to make a student recommendation letter more persuasive and compelling, and the result was absurd and comical. So be careful.

At first, law students who have come to law school with writing experience in other fields may feel that their personal voices or styles are being erased by the need to conform to the tone and professional voice of legal writing. Please know that this will ease with time. At first, the standards seem rigid as you adapt your writing to the legal audience and its expectations.

But once you have internalized the standards, your own legal writing voice can reemerge. It may be different and more formal, but it will still be yours. Most people who enter law school with distinctive written voices learn to appreciate their professional legal voice.

## §6.4 Overcoming Writer's Block

Suppose you sit down to write your first draft, and nothing happens. You stare at the computer screen, and it seems to stare right back at you. This does *not* mean you're an inadequate writer. Writer's block happens to everybody from time to time, even to the very best writers. The most important strategy is to *start early*. Writer's block is usually due to anxiety, and the most effective

way to reduce anxiety is to start writing early, even before you feel "ready." This is the reason why many writing teachers encourage "dump drafts," or what writer Anne Lamott calls "shitty first drafts." They get you past that first anxious hurdle. Assume you'll never feel ready, at least as a novice. Starting early will allow you to implement the strategies to avoid writer's block.

Here are some strategies:

**Do something unrelated for a while.** Take yourself out of the frustrating situation. Staring at your computer will only make you feel worse. Prepare for class, do the dishes, or jog. While you're doing that, your unconscious mind will continue to work and you may return to your computer with new energy. But be careful. In law, you're usually writing against a deadline, and doing something else shouldn't go on for too long.

**Do a Dump Draft.** This is sometimes call "freewriting." Just write. Pay no attention to organization, grammar, citation, or anything but getting what is in your head down on the paper. It can sound very informal: "that Jones case held that it was reasonable to drive in flip-flops and that makes me think that our client's driving in crocs is probably ok." Using "why" can also be helpful here. Once you get something down (like the example of the Jones case) ask yourself why. Why did the Jones case hold that? Why do you think driving in crocs is like driving in flip flops?

**Don't expect perfection in first drafts.** If you're chronically blocked when you try to do first drafts, it might be because you expect yourself to produce, in one draft, a polished final version. That's expecting too much. Even well-known novelists can't do it. Really bad first drafts are just fine.

**Start writing while researching and analyzing.** Open a document when you first start researching. Maybe it's your outline. Maybe it's just a blank document. While you're reading a case, some words of what you'd like to say might flash through your mind. Stick them in the document and don't worry about organization or grammar. This is the start of your dump draft. When you run out of steam while writing, go back to researching, reading, and analyzing. Reading, thinking, and writing are all part of a single process. To read is to trigger thinking, which can trigger writing.

**If writing the document's first part is blocking you, start somewhere else.** The reader starts at the beginning, but you don't have to. Sometimes just a small shift can shake you out of your block. The beginning parts of legal documents are often the hardest.

If you're not going to start writing at the beginning, where should you start? Summarize the law you've researched. Look at your outline and see if you already have thoughts about something or it jumps out as easier.

**AI might help here.** Ask AI to write the first section or fill in part of your outline. As noted earlier, this is never an ending point but always a starting point. View what AI gives you critically and make it better — and your own. But it can help you avoid the dreaded empty document.

**Separate yourself physically from distractions.** Set a goal (e.g., "I'm going to write the facts of my memorandum"). Clear your desk of *everything* except what you need to accomplish that goal. Put your phone in a drawer and shut off notifications on your computer.[2] Put on headphones and play brown or white noise. Then, promise yourself a reward if you reach your goal. It might also be useful to set a timer for an hour or other reasonable time. If you aren't done in an hour but you can take a break without losing flow, get up and walk around or do something else.[3]

## §6.5 Plagiarism

Plagiarism is using other people's words or ideas as though they are your own. You commit plagiarism if you lift words or an idea from *anywhere* else and put them into your own work without quotation marks (to avoid word plagiarism) and a citation (to avoid idea plagiarism or word plagiarism). Note that this includes using artificial intelligence or large language models and presenting their work as your own.[4] Your law school or your teacher might have a policy or guidelines to help you avoid plagiarism, and all schools punish plagiarism in one way or another.

Keep in mind, in legal writing, it makes no sense not to cite your sources, *if they are legitimate.* Legal writing does not generally reward original thinking; it rewards analysis that is strongly supported by legal authority. So your document *loses* credibility if you do not provide a citation for an idea.

For that reason, in legal writing, we more often see plagiarism from the work of classmates, or more currently, from AI sources. This is also usually a losing proposition because the quality of the writing from these sources is uneven, to put it mildly.

More importantly, there are ethical and moral reasons. You no doubt know them, having heard them in college and earlier. Other than your own self-respect and ethics, you shouldn't plagiarize because it can be devastating to your legal career. In law, your credibility and professional reputation are

2. Shailini George, *The Cure for the Distracted Mind: Why Law Schools Should Teach Mindfulness*, 53 Duq. L. Rev. 216 (Winter 2015).

3. You may find that the Pomodoro Technique is useful. https://www.pomodorotechnique.com.

4. Indeed, many AI and LLMs have been accused of plagiarizing the work of scholars, so if you lift verbatim from an AI or LLM, you may be plagiarizing someone else's work. *See* ReShonda Tate, *AI Stole My Words — Then Accused Me of Plagiarism*, Bay State Banner, April 23, 2025, https://baystatebanner.com/2025/04/23/ai-stole-my-words-then-accused-me-of-plagiarism.

everything. That is why virtually every bar association in the United States has some kind of character and fitness requirement. You risk throwing away your career if you plagiarize, get caught, and then have trouble gaining bar admission. It's just not worth it.

## §6.6 For *All* Writers — Even the Famous Ones — Writing Is Very Hard Work

> Writing is easy. You just sit at a typewriter until blood appears on your forehead.
>
> — *Red Smith*

It's not *that* hard. But at times it can feel that way. If you know the sensation Smith described, it doesn't mean that you're a bad writer. It probably means you are a good writer who cares about the quality of her work. Red Smith was the leading sports journalist of his time. Obviously, he wasn't a bad writer — but still he knew that feeling. So has nearly everybody else whose writing you've ever enjoyed reading.

Learning a skill at a higher level of proficiency, with new requirements, can make you feel that the competency you thought you had before has been taken away from you. Most students feel at least some of that while learning to write at a professional level. Doubt is sharpest near the beginning. But gradually — very gradually — it's replaced with a feeling of strength. By the end of law school instruction in writing, many students feel like much stronger writers than before because they've become stronger.

For now, please remember this: If in the weeks ahead you fall into doubt about your writing abilities, it'll be because you're learning a lot very quickly. It doesn't necessarily mean you're a bad writer. You might be learning to be a good writer. Once you absorb what you're learning and start producing professional writing — and that should happen — your prior confidence will return and be stronger than before, because you'll now be reaching for mastery.

Many law students and young lawyers report that while learning legal writing, they felt discouraged but later experienced a first moment of validation. That moment might have come when a legal writing teacher told them that they had done something really well. Or it might have come in a summer or part-time job, when a supervising lawyer complimented them on a well-written memo. Or it might have come in court when a judge leaned over the bench and said, "It was a pleasure to read your brief, counselor." That first moment of validation was the beginning of the recognition of *mastery*. Mastery was not yet complete. That would take much longer. But it had begun.

Many students and young lawyers also say that they wish they had realized while they were working so hard in a legal writing course that a moment

marking the beginning of mastery could eventually arrive. For most students, even for many who feel deeply discouraged along the way, that moment can come.

## §6.7 Don't Imitate Older Judicial Writing, Even If You Find It in Casebooks

Avoid the temptation to imitate unquestioningly whatever you happen to find in judicial opinions that appear in your casebooks. Those opinions are in casebooks for what they tell you about the law — *not* for what they tell you about how to write. And, your job as a junior lawyer is to allow a supervisor or judge to *avoid* reading the sometimes turgid and overly complicated legal writing that you often see in cases. If you are just giving your audience the same bloated, difficult prose you had to read three times to make sense of, you have not given them something useful. They might as well read the cases themselves.

In the last few decades, lawyers and judges have changed the way they look at writing. Verbosity, obscurity, arcaneness, and disorganization that were tolerated a generation ago are now viewed as unacceptable because they make the reader's job harder and sometimes impossible. Before you imitate something you've seen in an opinion, ask yourself whether you want to do it because it will actually accomplish your purpose, or because you feel safer doing what a judge has done. The latter is not a sound basis for a professional decision.

To get an idea of how things have changed since many of the opinions in your casebooks were written, read the opening paragraphs below from two decisions interpreting the same statute — 18 U.S.C. § 1708, which penalizes stealing "from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier." One opinion is written in a style that was once common, while the other has the clarity and forthrightness that supervisors and judges will expect of you.

### UNITED STATES v. ASKEY
108 F. Supp. 408 (S.D. Tex. 1952)

Counts 1 and 2 of the indictment charged defendant with violating 18 U.S.C. § 1708. Counts 3 and 4 charged violation of 18 U.S.C. § 495. The court sustained a motion to dismiss Count 2 and submitted the remaining counts to a jury which found defendant

### UNITED STATES v. PALMER
864 F.2d 524 (7th Cir. 1988)

About a month after settling into a house, Mildred Palmer found in her mailbox three envelopes addressed to Clifton Powell, Jr., the former occupant. Instead of returning the envelopes to the Postal Service, Palmer opened them. She found three checks (technically,

guilty as charged. The court had carried defendant's motion for judgment of acquittal on Count 1 along with the case. After receiving the verdict, the court announced that the verdict would be set aside as to Count 1.

. . . There is no allegation that the letter, from which defendant abstracted the Treasury check, was a mailed letter or one which had been removed from some office, station, letter box, receptacle or authorized depository. The language . . . from the statute prohibits the abstracting or removing from "such letter," clearly referring back to the first part of the statute, dealing with letters in the mails, or taken from some post office, receptacle or depository. In other words, it would be no offense to remove the contents of a letter never deposited for mailing or transmitted through the mails. . . .

warrants on Illinois's treasury) — no surprise, for the envelopes in which Illinois mails checks are distinctive. The district court described what happened next:

> Richard Morrison was present when Palmer brought the mail into the house and knew she had received the state warrants. Palmer and Morrison discussed negotiating the warrants and getting the proceeds. Someone endorsed Clifton Powell, Jr.'s name without his authority on the reverse side of each warrant. The warrants were then delivered by Morrison to a man named Lawrence Armour, Sr. Armour had something which neither Palmer nor Morrison had: a bank account. For a fee Armour negotiated the three state warrants through his bank account and returned the balance of the proceeds to Morrison who shared them with Palmer.

. . . We must decide whether converting the contents of an envelope violates § 1708 when the envelope was delivered to an outdated address . . .

Which opinion would you rather finish reading?

# GENERAL ANALYTICAL SKILLS

# Selecting Authority

## §7.1 Why Authority Matters

You're in a courtroom, hoping to persuade a judge to dismiss criminal charges against your client. After the client was arrested, police held him in an interrogation room from 1:00 AM until 10:00 AM. They refused to let him sleep or visit a restroom, and they refused to supply breakfast. Finally, after nine hours of this, he signed a confession. You want the confession thrown out as coerced, and you want the charges dismissed because the only evidence against him is the confession itself.

Standing before the judge, you say, "Depriving a person, for an extended period, of opportunities to fulfill necessary bodily functions is coercion, and any resulting confession is inadmissible evidence." That sounds like a rule of law with elements (Chapters 2 and 4).

The judge doesn't know for certain that what you said is law. And even if something like it is law, the judge doesn't know whether what you said is *accurate* law — whether you stated the rule exactly or whether it's actually a little different from what you said. For example, is the law's time element as flexible as you stated it ("an extended period"), or is it an inflexible bright-line test ("more than ten hours")? You might win if the test is flexible. Nine hours seems like an extended time under the circumstances (sleep, restroom, breakfast). But if the test turns out to be "more than ten hours," you will definitely lose because your client was held for nine hours.

"What's your authority for that, counselor?" asks the judge. She expects you to prove that the rule exists and that you have stated it accurately. If you can't prove that, you'll lose. She asked for authority because authority is the only way to prove the law.

If the rule is judge-made law, the authority would be judicial precedents that created the rule together with precedents that have enforced it. While enforcing a rule, courts often refine it by working out details about the rule's meaning. If a legislature created the rule, the authority would be a statute as well as cases that have interpreted the statute. Other types of authority include constitutions, court rules, administrative regulations, restatements, scholarly law review articles, and respected treatises.

Although coerced confessions are forbidden in a general sense by the U.S. Constitution's Fifth Amendment,[1] the specific rules on coerced confessions are in the thousands of precedents[2] interpreting the Fifth Amendment. When you answer the judge's question, you must identify the most important and relevant of them and explain why they support your position.

Of those thousands of precedents, which are the *most* authoritative? How can you identify the very few — perhaps a dozen — that are most likely to influence the judge's decision?

This chapter explains how to choose authority. Before reading the rest of this chapter, however, return to Chapter 1 and review §1.3 (Where Law Comes From) and §1.4 (The Common Law).

## §7.2 How Courts Are Organized

Because the United States has a federal system of government, we have two types of court structures — state and federal. Each state has its own courts, enforcing that state's law. And the federal government has courts throughout the country, enforcing federal law. The U.S. Constitution allocates limited responsibilities to the federal government and reserves the rest to the states. As a result, state courts adjudicate a much wider range of claims than federal courts. State courts, in fact, decide the overwhelming majority of cases.

Courts are either trial or appellate. A lawsuit starts in a trial court, which hears witness testimony and examines other evidence. After the trial court decides the case, the losing party can appeal to an appellate court, asking it to reverse the trial court's decision. Some states have only one appellate court. In those states, all appeals from trial courts go straight to the state's supreme court. The federal government and most states have two appellate levels. An appeal from a trial court goes to an intermediate appellate court. From there an appeal goes to the highest court.

1. "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."
2. A Westlaw search for "coerced confession" produces over 7,000 precedents.

### §7.2.1 State Courts

Every state has a trial court of *general jurisdiction*, which tries all cases except those that fall within the *limited jurisdiction* of a specialized trial court. Court names differ from state to state. In most states the general jurisdiction trial court is called the Circuit Court, the Superior Court, or the Court of Common Pleas. Among the specialized courts might be a Family Court, a Juvenile Court, a Small Claims Court, and others.

In some states, such as Pennsylvania and Maryland, the intermediate appellate court hears appeals from every part of the state. In others, such as California, New York, and Florida, the intermediate appellate court is divided geographically into districts, departments, or the equivalent.

Court names aren't consistent from state to state. In California and many other states, the Superior Court is a trial court. But in Pennsylvania, the Superior Court is the intermediate appellate court. In many states, the intermediate appellate court is called the Court of Appeals or a name close to that. But in New York, the Court of Appeals is the highest state court. In most states, the highest state court is called the Supreme Court. But in New York, the Supreme Court is a general jurisdiction trial court. In Oklahoma, the state Supreme Court is the highest court only for civil cases. For criminal cases, the highest court is the Oklahoma Court of Criminal Appeals. Oklahoma thus has two highest courts, and one of them is not called a supreme court. The same is true in Texas.

### §7.2.2 Federal Courts

The federal court system is organized around a general trial court (the U.S. District Court), a few specialized courts (such as the Tax Court), an intermediate appellate court (the Court of Appeals), and the final appellate court (the U.S. Supreme Court).

The U.S. District Courts are organized into 94 districts. Where a state has only one district, the court is referred to, for example, as the U.S. District Court for the District of Montana. Some states have more than one district court. California has four: the District Court for the Northern District of California (at San Francisco), the Eastern District (at Sacramento), the Central District (at Los Angeles), and the Southern District (at San Diego).

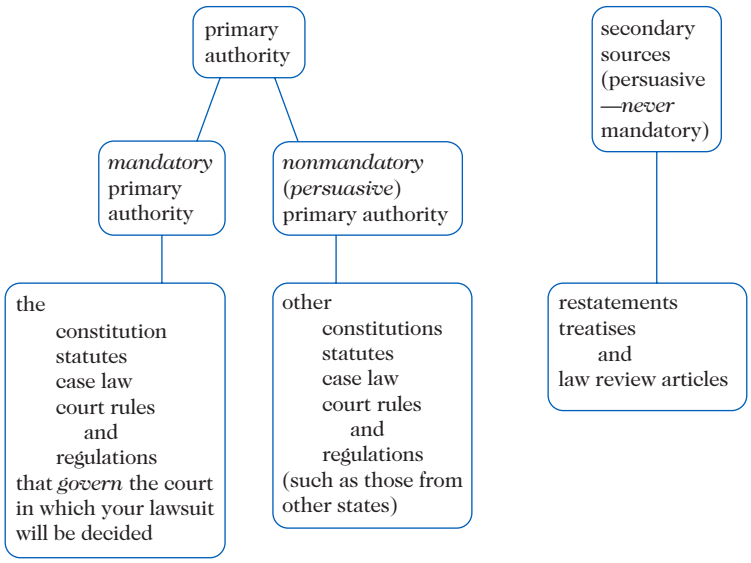
The U.S. Courts of Appeals are organized into 13 circuits. Eleven of the circuits include various combinations of states. The Fifth Circuit, for example, hears appeals from the district courts in Louisiana, Mississippi, and Texas. There's also a U.S. Court of Appeals for the District of Columbia and another for the Federal Circuit, which hears appeals from certain specialized lower tribunals.

The U.S. Supreme Court hears appeals from the U.S. Courts of Appeals. It also hears appeals from the highest state courts where the state court's decision

has been based on federal law. But the U.S. Supreme Court's jurisdiction is discretionary. In many other appellate courts, the losing party below has a right to appellate review — a right to have to the appellate court decide whether the lower court's decision should be reversed. The U.S. Supreme Court, however, has discretion to choose which appeals it will hear, and it chooses to hear very few.

## §7.3 Sources of Law

The two categories of legal resources are primary authority and secondary sources. You can follow this discussion more easily if you visualize it this way:


primary authority
mandatory primary authority
nonmandatory (persuasive) primary authority
secondary sources (persuasive —never mandatory)
the constitution statutes case law court rules and regulations that govern the court in which your lawsuit will be decided
other constitutions statutes case law court rules and regulations (such as those from other states)
restatements treatises and law review articles

### §7.3.1 Primary Authority

Primary authority includes precedent, statutes, constitutions, administrative regulations, and court rules, such as the Federal Rules of Civil Procedure. Primary authority is created by legislatures, courts, and other governmental entities that have the *power to make* law. Primary authority is either mandatory or persuasive.

Mandatory authority — which must be obeyed — is primary authority that has been created by *the government whose law controls the outcome of the dispute you are working on*. For example, in a tort case being litigated in an Ohio trial court under Ohio law, mandatory authority would include relevant Ohio statutes and appellate court decisions (and, rarely, the state constitution). *Mandatory authority* and *binding authority* mean the same thing.

Nonmandatory primary authority is primary authority that your court is not required to obey. It might persuade your court even if the court isn't required to follow it. *Nonmandatory authority* and *persuasive authority* mean the same thing. Nonmandatory precedent is precedent from courts that cannot govern the dispute you are working on. If you represent a client litigating a question of Ohio law, a decision by an Indiana state court on Indiana law is primary authority. But in Ohio, it is nonmandatory primary authority. Indiana courts can't create Ohio law.

How can you separate mandatory precedent from nonmandatory precedent? Look at the situation from the perspective of the judge who will rule on the dispute you are working on. Courts to which a losing party can appeal are courts that can reverse the judge's decision. Precedent from those courts is mandatory authority because, if the judge doesn't obey it, the judge's decision will be reversed. The Ohio Supreme Court can reverse other Ohio courts, either directly or indirectly. But the Indiana Supreme Court has no power to reverse an Ohio trial court.

A state's supreme court binds all lower courts in that state. A state's intermediate appellate court binds trial courts under its jurisdiction. If the state has a state-wide intermediate appellate court like the Pennsylvania Superior Court (see §7.2.1), its precedents are mandatory authority in all the state's trial courts because the Superior Court can reverse any of their decisions. If the state has a geographically segmented intermediate appellate court (again see §7.2.1), each part of that court can reverse trial courts only in its part of the state.

In federal courts, the U.S. Courts of Appeals are *coordinate* courts in relation to each other (see §7.2.2). Looking at the country as a whole, one circuit's Court of Appeals has the same rank as every other circuit's Court of Appeals. The Courts of Appeals do not bind each other. In fact, federal law can differ from one circuit to another. For example, the Second and Fifth Circuits have different tests for preliminary injunctions.

Arizona is part of the Ninth Circuit. The Ninth Circuit Court of Appeals can reverse decisions made by a U.S. District Court judge located in Arizona. Thus, the Ninth Circuit Court of Appeals' decisions are mandatory authority in Arizona. They are not mandatory in New Mexico, which is in the Tenth Circuit. But if the Tenth Circuit has no precedent on a given issue, the Ninth Circuit's decisions might help a New Mexico federal court to fill the gap (see §7.5).

### §7.3.2 Secondary Sources

Secondary sources are not law. They describe the law or explain it. Secondary sources might be persuasive, but they are never mandatory.

Secondary sources are produced by people or organizations that might be experts about the law, but have no power to create it. The secondary sources

most likely to be cited are restatements, treatises written by scholars, and articles and similar material published in law reviews. Other types exist, but these three are the ones you are most likely to encounter in the first year of law school.

A restatement is a series of black-letter common law rules organized into sections with supplemental drafters' comments. Restatements are commissioned by the American Law Institute to formulate a consensus view of (restate) the common law. Restatements have an important role in first-year Torts, Contracts, and Property courses, as well as several second- and third-year courses. When a restatement is no longer up-to-date, it is superseded by a second or third version. Thus, the Restatement (Third) of Property replaced the Restatement (Second) of Property.

The persuasive weight of a treatise depends on the reputation of its author and on whether the treatise has been kept up-to-date. Some of the outstanding treatises have been written by Wigmore (evidence), Corbin (contracts), Williston (contracts), and Prosser and Keeton (torts). Some treatises are multivolume works; some are in a single volume; some are updated continually; and some are updated only when a new edition is published.

Law reviews print two kinds of material: (1) articles, which are written by scholars, judges, and practitioners, and (2) notes and comments, which are written by students. If an article is thorough, insightful, or authored by a respected scholar, it may influence a court. Only in the most unusual of circumstances does a student note or comment influence a court. But even where law review material will not be influential, it might help you analyze an issue, and its footnotes can help you find cases, statutes, and other authority.

## §7.4 The Hierarchy of Authority

Authority is ranked so that one can be chosen over another. The following are some of the basic rules:

*Mandatory authority always outranks nonmandatory authority.* On questions of Ohio law, for example, Ohio statutes and Ohio Supreme Court precedents outrank Indiana precedents as well as restatements, treatises, and law review articles.

*Within the same jurisdiction, the separation and allocation of powers causes some mandatory authority to outrank other mandatory authority.* A constitution prevails over an inconsistent statute. Either a constitution or a statute prevails over inconsistent case law, court rules, and administrative regulations.

This is basic civics. Constitutions create governments. A legislature, a court, or an administrative agency has only the powers granted by the applicable constitution. Although a state's courts can make common law, the legislature has a superior power to create law in statutes, and statutes outrank the common law.

*Within the same jurisdiction, a decision from a higher court outranks a decision from a lower court — if the higher court has the power to reverse the lower court.* See §7.3.1.

*Within the same jurisdiction, newer mandatory authority outranks inconsistent older mandatory authority.* An Ohio statute enacted last year outranks an Ohio statute from fifteen years ago if the two statutes are inconsistent with each other. The newer statute also outranks precedent interpreting the older statute.

If the Ohio Supreme Court overrules one of its own precedents — or if it decides a case in a way that's somehow inconsistent with one of its own precedents — the new precedent outranks the older one.

## §7.5 How to Use Nonmandatory Precedent and Secondary Sources to Fill a Gap in Local Law

A gap can exist when your jurisdiction's case law doesn't have all the legal rules needed to resolve your case. Your court must decide whether to fill that gap and, if it does so, which rule to adopt. Nonmandatory precedent and secondary sources might help your court make those decisions. But be careful. Some gaps can be filled only by a legislature. Sections 1.3 and 1.4 in Chapter 1 explain the difference between court-made common law and law made by legislatures. In addition, §7.1 in this chapter includes a constitutional issue where nearly all the rules have been created through precedent. If an issue is normally reserved to legislatures, your court won't be able to create basic rules filling a gap. That's the legislature's job.

Another type of gap occurs when your jurisdiction has a rule — whether court-made or statutory — but it isn't clear how that rule should be applied to facts like yours. Nonmandatory precedent and secondary sources might help a court decide how to apply the rule. But nonmandatory authority can help only if it comes from a jurisdiction that has the same basic rule that your jurisdiction has. If the other jurisdiction's courts enforce a different rule, those precedents won't help your court decide how to enforce your jurisdiction's rule.

Fill a gap in two steps. Begin by laying a foundation that explains the gap. Then use nonmandatory precedent or secondary sources to fill it.

### §7.5.1 Laying the Foundation

Define the gap and specify how local law doesn't resolve the issue. Local law means the law governing your dispute. For example, Ohio tort law is local law if the dispute concerns an auto accident in Ohio.

A deep gap can occur where the issue is one of *first impression* in local law. That means that local appellate courts have never before resolved it. If some

local courts have ruled, the issue is no longer one of first impression, but a gap would still exist if the rulings are from lower courts and the jurisdiction's highest court has not settled the law. Or, local cases might have come close to the issue without directly resolving it. Another kind of gap occurs where the local cases are so old or so poorly reasoned that they no longer represent current public policy.

To lay the foundation, do three things:

1. state the issue precisely,
2. explain what local law has decided, and
3. identify what local law has *not* decided.

The gap is what local law hasn't decided. But to understand the gap, the reader needs to know what local law *has* decided.

The following lays a foundation concisely:

> No appellate court in this state has decided whether the sale of a newly built home implies a warranty of habitability, and the legislature has enacted no statute that would resolve the issue. However, an implied warranty of habitability has been recognized, as a matter of common law, in a growing number of states. . . .

Here, the gap is total: there are no statutes and no case law.

Things usually aren't that clear cut. A few local cases might have nibbled around the edges of the issue without actually resolving it. Or some cases might have set out relevant public policy while resolving other issues — but not your issue. In situations like these, the foundation isn't complete until you have explained, in as much detail as the reader would need to agree with you, why the issue is still open.

> No reported decision has determined whether a violation of § 432 *[a local statute]* is negligence per se. But Colorado and Arizona *[neighboring states with similar conditions]* have enacted similar statutes. *[Here, you should add an explanation of those statutes sufficient to convince the reader that they really are similar.]* Courts in those states have held. . . .

Here we have a statute, but the courts have not yet decided a certain aspect of its meaning (whether a violation is negligence per se). The foundation won't be complete until you have shown that the Colorado and Arizona statutes are so similar that they should be interpreted the same way.

> The Second District Court of Appeal has permitted this type of jury instruction. But the Fourth District considers it reversible error because it confuses juries. *[Here, add explanations of the Second and Fourth District cases, and show they come to opposite results.]* It is also reversible error in federal courts and in most other states that have considered the issue. . . .

Here you have in-state cases, but they disagree with each other. To complete this foundation — and before discussing the out-of-state authority — the Second and Fourth District cases would have to be explained.

The following is not a foundation:

> Kansas *[the decisional state]* has not addressed this issue.

The reader hasn't been told what Kansas *has* done. Are there no analogous precedents? If not, say so. Is there nothing in Kansas law that would set out local public policy on the question? If not, say so. The reader needs to know exactly what the gap is and how deep it is.

Don't lecture the reader on basic principles of the hierarchy of authority ("since there are no reported decisions in this state on this issue, it is necessary to look to the law of other jurisdictions"). The reader long ago learned that that is the standard method for filling gaps.

### §7.5.2 Filling the Gap

Once you've laid the foundation, explain the nonmandatory precedent or secondary sources or both. Show exactly how and why that authority provides good guidance.

If you're using nonmandatory precedent, choose it in approximately this order of priority:

First, did the nonmandatory precedent decide the same issue that arises in your client's case? Go back to the confession case you were arguing at the beginning of this chapter. Your issue is whether depriving a person, for an extended period, of opportunities to fulfill necessary bodily functions constitutes coercion. An entirely different issue is whether threats of violence are coercion. Because threats-of-violence precedents decide a different issue, they are barely relevant to your case and might not be relevant at all.

Second, was the nonmandatory precedent decided on facts similar or analogous to your client's facts? If the facts aren't analogous, the nonmandatory precedent is distinguishable. Chapter 9 explains why.

Third, how good is the nonmandatory precedent's reasoning? Is the logic sound? Did the court explore the issue thoroughly? Or did it just state its conclusion without much explanation?

Fourth, what kind of court decided the issue? Is it the highest court in its jurisdiction? Is it a court that has in the past, influenced the courts in your jurisdiction?

Fifth, how has the precedent been treated in other cases and in secondary sources? Have other courts cited it with approval? Or has it been criticized in other courts and in scholarly treatises?

Sixth, when was the precedent decided? Your court might treat recent opinions as more authoritative than very old ones, simply because changing social

conditions can make a rule obsolete. But don't dismiss an older opinion just because it's old. If the relevant social conditions haven't radically changed, older opinions can still be excellent law. Your casebooks are filled with older opinions that are still widely cited by courts today.

Precedent interpreting statutes in other jurisdictions is treated somewhat differently from precedent interpreting the common law. That's because precedent interpreting statutes is authority only for what *specific* words mean in *specific* statutes. That precedent has no life independent of the words interpreted.

Precedent interpreting a statute from another state can be persuasive sources, but only if the other state's statute is similar to your statute. If the two are identical, precedent from the other state can be particularly persuasive. Two statutes can be virtually identical even if there are minor differences in wording that do not affect the statutes' meaning. But where the substance of the statutes is different, precedent from the other state has more limited value. If the two statutes take radically different approaches to solving the same problem, precedent from the other state usually has little or no value.

If your state's statute is based on a model statute, such as the Uniform Commercial Code, courts can easily see the persuasiveness of precedent interpreting other states' enactments of it. But states often make changes in uniform statutes when enacting them. Be sure that the other state's version of the model statute isn't significantly different from your statute's version.

If you cannot fill the gap with primary authority, you will need to rely on secondary sources. Some secondary sources are more persuasive than others. You can usually tell this by reading your state's case law on similar issues to discover the types of secondary sources on which the courts rely. For example, if you see decisions that cite the Restatement of Torts, Second, that is a good indicator that in torts cases, the Restatement is a persuasive secondary source to cite.

## §7.6 How Courts Use Dicta

A holding is a court's ruling on an issue. A holding creates precedent because later courts must follow it through the doctrine of stare decisis. Reasoning *essential* to a court's holding is part of the precedent.

*Dicta* are comments in a judicial opinion that are *not* essential to a court's ruling on an issue. Dicta aren't part of courts' holdings, and therefore aren't precedent. Often dicta discuss facts that are not before the court. Examples are in the next paragraph. Dicta are only nonmandatory authority, and can never be mandatory authority. (Lawyers disagree about whether and when to

say *dicta* or *dictum*. The footnote explains why.[3] We take no position on this, and whatever your teacher prefers is correct.)

Decisions include dicta for a variety of reasons. Sometimes dicta add clarity. A court might want, for example, to make clear what it is *not* deciding: "If the plaintiff had presented evidence of injury to his reputation, he might be entitled to damages." A court might add dicta to justify an apparently harsh decision: "Although these facts might constitute a cause of action for defamation — which the plaintiff did not bring — they do not substantiate the invasion of privacy cause of action asserted in the complaint, which we dismiss." Or a court might use dicta to suggest something to a lower court for action on remand: "Although the parties have not raised on appeal the question of appropriate damages, that issue is likely to arise in the new trial we have ordered, and we point out that. . . ."

Because dicta doesn't create precedent, lawyers rely on dicta sparingly. But on occasion, they do rely on it. If the court that wrote dicta can reverse the court in which your case is being or could be litigated, the dicta, though not mandatory, becomes especially influential.

It isn't wrong to use dicta. But it is wrong to use it inappropriately. Dicta can never take the place of a holding, and it's wrong to treat dicta as though it could. If you do use dicta, identify it as such. Otherwise a reader might think that what you've written is sloppy, or an attempted deception.

## §7.7 Nonprecedential Opinions

For a judicial opinion to serve as precedent, a court must designate it for publication in the official case reporter. Sometimes courts issue opinions that they don't intend to be used as precedent. These opinions are called *nonprecedential*, or *unpublished*, because they aren't published in official reporters.

While researching, you might run across these cases, because they're often available through electronic legal research services. If you encounter a case that doesn't have a citation to a print reporter, always check to see whether it's nonprecedential. If the case has only an electronic citation, it's probably nonprecedential. If it is nonprecedential, most electronic legal research services also note that at the top of the document.

3. In Latin, *dictum* can mean either "word" or "something said" or "statement." See D.P. Simpson, Cassell's New Latin Dictionary 188 (1959). The plural is *dicta* ("words" or "statements"). In legal writing, *dictum* is short for *obiter dictum*, meaning "a statement made in passing" (singular). More often you will see the plural *obiter dicta,* meaning "words said in passing" or "statements made in passing."

Nonprecedential judicial opinions can never be mandatory authority because, by definition, they aren't legal precedent. Thus, even if an opinion comes from the highest court in your jurisdiction, you cannot rely on it or cite it as mandatory in a legal document. But lawyers do read nonprecedential opinions, which can play a role in your legal analysis.

If you're confused about this, you aren't alone. There's no widespread consensus on how and when nonprecedential opinions can be used. Because their status is controversial, you should cite nonprecedential opinions in writing only rarely, and even then with caution. Some courts have rules limiting the use of nonprecedential opinions. If you are considering citing nonprecedential authority in a memo or brief to be filed in a court, check that court's rules first. In a brief you submit to a U.S. Court of Appeals, for example, you can cite federal nonprecedential opinions issued after January 1, 2007.[4] But even though citation is allowed, the judges can give the opinion any weight they want. Some might be persuaded by it. Others will ignore it just because of its status as nonprecedential.

Although nonprecedential opinions aren't mandatory authority, they can still be useful as persuasive authority because they do reflect a court's attempt to resolve a legal issue by applying the law to a particular set of facts, which might be similar to yours. And in predictive writing, a nonprecedential opinion might give you some indication of how judges tend to react to the issues and facts you are dealing with. Even if you wouldn't use a nonprecedential opinion in a court document, you might provide it to a supervisor in an interoffice communication, or use it yourself to help you develop your understanding.

## Exercise
## The Hierarchy of Authority

You are working on a case that is now being litigated in the U.S. District Court for the District of Nevada. You have been asked to find out whether a defendant who made and lost a motion to dismiss for insufficient service of process can now subsequently move to dismiss for failure to state a claim on which relief can be granted. (Don't worry about exactly what that means. Just know that Rule 12 of the Federal Rules of Civil Procedure governs motions to dismiss in federal courts.)

You have found the following authority, all of which squarely addresses your issue. Make a preliminary ranking of the authorities solely from the information provided below. California and Nevada are both in the Ninth Circuit.

4. Rule 32.1 of the Federal Rules of Appellate Procedure.

*Catdog v. Amundsen* — 4th Circuit, 2008

*Great Basin Realty Co. v. Rand* — Nevada Supreme Court, 2002

Matthewson's treatise on Federal Courts (published last year)

*Wilkes v. Jae Sun Trading Corp.* — 9th Circuit, 1977

Pincus v. McGrath — United States Supreme Court, 1949

Rule 12 of the Federal Rules of Civil Procedure (effective 1938)

*Barking Pumpkins Records, Inc. v. Sepulveda* — California Supreme Court, 2009

*Garibaldi v. City of Boulder* — 10th Circuit, 2003

*Ott v. Frazier* — 7th Circuit, 1931

# Working with Statutes

## §8.1 Five Tools of Statutory Interpretation

If a statute has been interpreted by a court whose decisions are mandatory authority (Chapter 7), the statute means whatever that court says it means, and lawyers say that the statute's meaning is *settled* law. But often the meaning isn't settled, and you'll use the tools explained in this chapter.

Some statutes have never been interpreted by a mandatory appellate court, but that's unusual. More often, a mandatory appellate court has interpreted part of a statute but not all of it. If, for example, a statute has nine sections, and a mandatory appellate court has interpreted eight of them definitively, the ninth section's meaning is still unsettled law. For that ninth section, you'll need to do what some future court would do — determine meaning using some or all of the following tools for interpreting statutes:

1. the statute's *words*
2. the statute's *context*, which can show what the legislature was trying to accomplish — also known as the policy behind the statute
3. a collection of maxims known as the *canons of statutory construction*
4. *interpretations of the statute from nonmandatory authority* — lower or collateral courts, administrative agencies, and scholars
5. the statute's *legislative history*, which consists of the documents and records created by various parts of the legislature during the course of enactment

At one time, nearly every jurisdiction in the United States strictly followed the plain meaning rule, which permits use of other statutory interpretation tools only if the statute's words are ambiguous. In a strict plain meaning state, you are required to limit yourself to the statute's wording if the words have a "plain meaning," and you are permitted to use the other tools only if the words are ambiguous.

But lawyers and courts use the other tools frequently. First, statutes often are ambiguous. Some statutes are magnets for ambiguity. Second, in a number of states, the courts have modified or abolished the plain meaning rule and now search outside the statute for evidence of intent even where the statutory wording seems clear and unambiguous.

## §8.2 The Statute's Words

Courts always begin with the statute's words. Some statutes define their own words. The statutes in Chapter 4 are examples. Sometimes a relatively mundane word is defined, for the purposes of the statute, in a surprising way. And a term may have different meanings in different statutes.

For example, section 6-201 ("Franchises") of the Administrative Code of the City of New York defines "the streets of the city" as

> streets, avenues, highways, boulevards, concourses, driveways, bridges, tunnels, parks, parkways, waterways, docks, bulkheads, wharves, piers, and public grounds or waters within or belonging to the city.

while the same Code's section 16-101(3) ("Department of Sanitation") defines "street" to include any

> street, avenue, road, alley, lane, highway, boulevard, concourse, driveway, culvert and crosswalk, and every class of road, square and place, and all parkways and through vehicular park drives except a road within any park or a wharf, pier, bulkhead, or slip by law committed to the custody, and control of the department of ports and terminals.

Why might a wharf be a "street" in one part of a code but not in another? In section 6-201, the word "street" stands for a place where activity might require getting a franchise from the city. In section 16-101(3), the same word stands for a place for which the Department of Sanitation has the responsibility for cleaning, sweeping, sanding, and removing ice, snow, and garbage. Because the purposes are different, the meaning is different. But the drafters couldn't invent two new words — one for each meaning. They had to use "street" in both places.

## §8.3 The Statute's Context

Context might reveal policy — what the legislature was trying to accomplish — and a statute is to be interpreted consistently with its policy. Courts will not mechanically apply a statute in a literal way that would undermine the approach the legislature has taken to solving the problem in dispute.

The *statutory* context can include other sections of the same statute, the heading (name) of the section at issue, the statute's title and preamble (if any), and other statutes addressed to the same subject matter. It can also include statements of policy in the statute's preamble and in the preambles of other statutes.

The *social and economic context* might identify the events and conditions that could have motivated the legislature to act. But this would be limited to social and economic conditions that existed at the time of enactment, not later.

## §8.4 Canons of Statutory Construction

A canon of statutory construction is a general guideline. Here are some examples:

> A statute is to be construed in light of the harm the legislature meant to remedy.
>
> Statutes on the same subject (in Latin, *in pari materia*) are to be construed together.
>
> If two statutory provisions apply, the more specific provision governs over the more general one.
>
> Where possible, statutes are to be construed so that their constitutionality is preserved.
>
> When a statute has been interpreted by courts, and the legislature has not later amended the statute, the legislature is presumed to have acquiesced in the court's interpretation.
>
> Words used in a statute are assumed to have the meaning they already have in the law generally. But if the words are not terms of art with special meaning in the law, they are assumed to mean what ordinary dictionaries say they mean.
>
> Penal statutes are to be narrowly construed.

Courts can't know whether legislators have enacted a particular statute with the canons in mind — or even whether legislators have ever heard of

the canons of construction. It is also true that canons tend to be inconsistent with one another, and that courts may invoke them to justify decisions rather than to help in making decisions.[1] But most canons of construction are useful concepts.

Canons are rules of a sort and must be proved with authority. Originally all canons were judge-made law. Many state legislatures, however, have enacted statutes governing how courts must interpret the state's statutes, and these codify or overrule some of the canons.[2] Unless the legislature has done that, the authority for a canon is in precedents alone.

## §8.5 Interpretations from Nonmandatory Authority

You might find any of the following. None are mandatory authority. Your courts might or might not be persuaded by them.

*Interpretations by lower courts or collateral courts*. If the interpretive precedent is from a court that cannot reverse the court where your issue would first be litigated, that precedent is not binding but might persuade your court (see Chapter 7).

*Interpretations of the statute by administrative agencies charged with enforcing the statute.* Courts sometimes defer to a specialized enforcement agency, assuming that an agency that constantly deals with a statute understands it better than judges do.

*Comparison with parallel statutes in other jurisdictions.* Sometimes states enact similar statutes, or even identical ones, such as the Uniform Commercial Code. If Iowa's courts have interpreted a certain section of the UCC and Minnesota's courts haven't, the Iowa cases might be persuasive in Minnesota although they wouldn't be binding there.

*Interpretations of the statute by scholars who are recognized experts in the field.* If a scholar has written books or extensive law review articles about a statute, a court might be persuaded by the scholar's expertise.

## §8.6 Legislative History

You might think that the sensible thing would be to ask the legislature what it had in mind when it enacted the statute. The people who enacted it ought to know what the words mean. Actually, as a group they don't.

The collective intent of a legislature, or of any other large group of people, may simply be more a metaphysical idea than something ever provable through

1. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 521-35 (1960).
2. For example, Kan. Stat. Ann. § 77-109 (1997) and Tex. Gov't Code Ann. tit. 3, subtit. B (2015).

evidence. Most state legislatures have between 100 and 200 voting members. Congress has 100 Senators and 435 Representatives. A legislature is just too large to be able to tell you what it — as a group — was thinking in some prior year when it enacted the statute you're interested in.

Legislatures consider such a staggering number of bills that most members aren't likely to have clear memories years later of what they thought a bill meant at the moment they voted for or against it. Many questions of statutory interpretation arise long after enactment, when few of the enacting legislators are still in office or even alive.

The only direct evidence of legislative intent is what legislators or legislative committees said and wrote *while the statute was being drafted and enacted.* This is the statute's legislative history.

Although legislative history would seem to be the most direct evidence of the legislature's purpose, it is sometimes viewed with suspicion. It is often incomplete, especially with state statutes, and because of the chaotic nature of legislative work, it can be internally inconsistent. Parts of it can contradict other parts. It is also vulnerable to manipulation by legislators who may not share the views of a majority of their colleagues. Most legislators have no more understanding of a bill than they can get from a quick reading of it or — more likely — from reading a short synopsis of it but not the statute itself.

Some portions of the typical legislative history, however, tend to be viewed by the courts as particularly reliable. Written reports from the legislative committees that considered and drafted the statute explain to the legislature as a whole why the statute is needed and what it is meant to accomplish. If a committee report is thorough and well written, it might be the best evidence of legislative intent.

## §8.7 An Example of Statutory Interpretation at Work

Below are two decisions during the same criminal case interpreting the National Motor Vehicle Theft Act, enacted by Congress in 1919.

If you want to steal something, you'll have to move it and hide it. You might be especially interested in stealing cars and other motor vehicles because their portability makes your job easier. Their whole purpose is to be moved. And you can move them fast across state lines. You can steal a car in Boston tonight and be in Chicago, five states away, by tomorrow night. The Boston police can't track you down and arrest you in Chicago. But the federal government might. That's why Congress passed the National Motor Vehicle Theft Act.

Does the statute cover aircraft? William McBoyle stole an airplane and flew it to another state. He was convicted of violating the Act and appealed to the U.S. Court of Appeals for the Tenth Circuit, arguing that an airplane isn't a "motor vehicle" under the statute. In the first decision below, the Tenth Circuit ruled against him.

After losing in the Tenth Circuit, McBoyle appealed to the U.S. Supreme Court. In the second decision below, you'll learn whether he won there or lost.

## McBOYLE v. UNITED STATES
43 F.2d 273 (10th Cir. 1930)

PHILLIPS, Circuit Judge.

William W. McBoyle was convicted and sentenced for an alleged violation of the National Motor Vehicle Theft Act, section 408, title 18, U.S. Code. The indictment charged that on October 10, 1926, McBoyle caused to be transported in interstate commerce from Ottawa, Ill., to Guymon, Okl., one Waco airplane, . . . which was the property of the United States Aircraft Corporation and which had theretofore been stolen; and that McBoyle then and there knew it had been stolen. . . .

In the movies, when you hear someone say, "They've crossed the state line — call the FBI," this is the kind of statute that creates federal jurisdiction.

The primary question is whether an airplane comes within the purview of the National Motor Vehicle Theft Act. This act defines the term "motor vehicle," as follows:

> The term "motor vehicle" when used in this section shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails.

Counsel for McBoyle contend that the word "vehicle" includes only conveyances that travel on the ground; that an airplane is not a vehicle . . . ; and that, under the doctrine of ejusdem generis, the phrase "any other self-propelled vehicle" cannot be construed to include an airplane.

A *canon of construction*: Where general language follows a list of specific examples, the general language's meaning is limited to the same nature as the specific (*ejusdem generis*), unless there are clear indications to the contrary.

[In a passage deleted here, the court traces various meanings ascribed to the word "vehicle" in both legal and popular usage, quoting authorities that define a vehicle as an object that travels and carries things or people. One of the definitions specifies that a ship is a vehicle; according to another, a vehicle carries things or people, "especially on land."]

The court focuses on the *words of the statute* and considers the canon of *ejusdem generis* only long enough to decide that the court's interpretation of the statute would not offend the canon.

Both the derivation and the definition of the word "vehicle" indicate that it is sufficiently broad to include any means or device by which persons or things are carried or transported, and it is not limited to instrumentalities used for traveling on land, although the latter may be the limited or special meaning of the word. We do not think it would be inaccurate to say that a ship or vessel is a vehicle of commerce.

An airplane is self-propelled [and] is designed to carry passengers and freight from place to place. It runs partly on the ground but principally in the air. It furnishes a rapid means for transportation of persons and comparatively light articles of freight and express. It therefore serves the same general purpose as an automobile, automobile truck, or motorcycle. It is of the same general kind or class as the motor vehicles specifically enumerated in the statutory definition and, therefore, construing an airplane to come within the general term, "any other self-propelled vehicle," does not offend against the maxim of *ejusdem generis*.

Furthermore, some meaning must be ascribed to [Congress's use of the] phrase "any other self-propelled vehicle" [immediately after Congress had specifically listed] all of the known self-propelled vehicles designed for running on land. . . .

We conclude that the phrase, "any other self-propelled vehicle," includes an airplane. . . .

Are you convinced by the court's interpretation of the statutory wording?

Cotteral, Circuit Judge (dissenting).

I feel bound to dissent on the ground that the National Motor Vehicle Theft Act should not be construed as relating to the transportation of airplanes.

A prevailing rule is that a penal statute is to be construed strictly against an offender and it must state clearly the persons and acts denounced. [Citations omitted.]

Another *canon of construction*. The dissenter will soon try to link this one up with *ejusdem generis*.

It would have been a simple matter in enacting the statute to insert, as descriptive words, airplanes, aircraft, or flying machines.

Now the dissenter takes on the *words of the statute*, but in a way the court did not. The dissenter asks what Congress could

If they had been in the legislative mind, the language would not have been expressed in such uncertainty as "any other self-propelled vehicle not designed for running on rails." The omission to definitely mention airplanes requires a construction that they were not included. Furthermore, by excepting vehicles running on rails, the meaning of the act is clarified. These words indicate it was meant to be confined to vehicles that *run,* but not on rails, and it did not extend to those that *fly*. . . .

have written into the statute but chose not to.

The rule of *ejusdem generis* has special application to this statute. General words following a particular designation are usually presumed to be restricted so as to include only things or persons of the same kind, class, or nature, unless there is a clear manifestation of a contrary purpose. [Citation omitted.] The general description in this statute refers to vehicles of the same general class as those enumerated. We may assume an airplane is a vehicle, in being a means of transportation. And it has its own motive power. But is an airplane classified generally with "an automobile, automobile truck, automobile wagon, or motor cycle"? Are airplanes regarded as *other types of automobiles* and the like? A moment's reflection demonstrates the contrary.

The dissenter turns to the *canon* considered in the court's opinion.

Counsel for appellant have referred us to debates in Congress when the act was pending as persuasive of an interpretation in his favor. [Citations to the Congressional Record omitted.] . . . The discussions of the proposed measure are enlightening . . . in showing that the theft of automobiles was so prevalent over the land as to call for punitive restraint, but airplanes were never even mentioned.

Because this question was not addressed in the reports of the committees that drafted the statute, the only relevant *legislative history* is the floor debates. Floor debates are a notoriously unreliable form of legislative history because they can include remarks by legislators who took no part in drafting the statute in committee, who might not have thought much about it, and who may not even have read it. But here the floor debates reveal surprising evidence of legislative intent: no legislator complained about a need to do something about airplane theft.

It is familiar knowledge that the theft of automobiles had then become a public menace, but that airplanes had been rarely stolen if at all, and it is a most uncommon thing even at this date. The prevailing mischief sought to be corrected is an aid in the construction of a statute. [Citation omitted.]

Finally, the dissenter takes up the *historical context.*

## McBOYLE v. UNITED STATES
283 U.S. 25 (1931)

Mr. Justice HOLMES delivered the opinion of the Court. . . .

The question is the meaning of the word "vehicle" in the phrase "any other self-propelled vehicle not designed for running on rails." No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air, and sometimes legislation extends the use in that direction, e.g., land and air, water being separately provided for, in the Tariff Act [of] 1922 [citation omitted]. But in everyday speech "vehicle" calls up the picture of a thing moving on land. Thus in Rev. Stats. § 4, intended, the Government suggests, rather to enlarge than to restrict the definition, vehicle includes every contrivance capable of being used "as a means of transportation on land." And this is repeated, expressly excluding aircraft, in the Tariff Act [of] 1930 [citation omitted]. So here, the phrase under discussion calls up the popular picture. For after including automobile truck, automobile wagon and motor cycle, the words "any other self-propelled vehicle not designed for running on rails" still indicate that a vehicle in the popular sense, that is a vehicle running on land, is the theme. It is a vehicle that runs, not something, not commonly called a vehicle, that flies. Airplanes were well known in 1919, when this statute was passed; but it is admitted that they were not mentioned in the reports or in the debates in Congress. It is impossible to read words that so carefully enumerate the different forms of motor vehicles and have no reference of any kind to aircraft, as including airplanes under a term that usage more and more confines to a different class. The counsel for the petitioner have shown that the phraseology of the statute as to motor vehicles follows that of earlier statutes of Connecticut, Delaware, Ohio, Michigan and Missouri, not to mention the late Regulations of Traffic for the District of

While dissecting the *words of the statute*, Holmes considers the *statutory context*.

*Historical context* and *legislative history* are considered together.

Again, Holmes simultaneously uses two tools — this time *legislative history* and *comparison with parallel statutes.* The point is that Congress seems to have modelled the Act on statutes that clearly do not address aircraft theft. The most telling comparison — and perhaps the most enjoyable for its irony — is with a *city's* traffic regulations, which certainly could not have been meant to penalize the stealing of airplanes.

Columbia [citation omitted], none of which can be supposed to leave the earth.

. . . When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or even upon the speculation that, if the legislature had thought of it, very likely broader words would have been used. [Citation omitted.]

Judgment reversed.

As important as *policy* is, it also has its limitations. Here Holmes notes that his court is permitted to construe the statute only to accomplish the goal Congress had selected for it — and not some other goal the court might think equally valid.

Unhappy with the Supreme Court's decision, Congress amended the statute so that it now punishes anyone who

> transports in interstate or foreign commerce a motor vehicle, vessel, *or aircraft,* knowing the same to have been stolen.[3]

Congress later added a definition of "aircraft" so the statute could adapt to changing technology:

> "Aircraft" means any contrivance now known *or hereafter invented, used, or designed* for navigation of or for flight in the air.[4]

That definition was added when airplanes were still powered by piston engines and propellers rather than by jet engines.

Would the statute today penalize knowingly moving a stolen interplanetary rocket across a state line? Look carefully the definition quoted above. To get to Mars, the rocket would have to travel for a few minutes through the atmosphere's air. But for many months afterward, it would travel through a void where there is no air (outer space). Is traveling through air the rocket's purpose or goal — the reason it was created? Its purpose is primarily to travel through outer space, and traveling through air is only incidental to that purpose (months versus minutes). Remember that an airplane travels a short

3. 18 U.S.C. § 2312 (emphasis added).
4. 18 U.S.C. § 2311 (emphasis added).

distance on land to become airborne, but the Supreme Court held in *McBoyle* that an airplane is not a motor vehicle.

There's no case law on this. But if you would like to know the answers to all these questions, you could steal an interplanetary rocket, move it across a state line, and appeal your conviction to the Supreme Court. Depending on how the Justices interpret the words "invented . . . for," you might spend many years in prison — or you might walk freely like McBoyle. Whenever a legislature enacts a statute with wording that is less than perfectly clear, we can't know for certain what it means until a court tells us while deciding a case.

## §8.8 How to Present Statutory Analysis in Writing

Focus on the words of the statute because the words are what you must interpret. The crucial term or phrase should appear, inside quotation marks, when you state the issue, your conclusion, the rule on which you rely, and the most important steps in your analysis. For example, state the issue like this:

> If regularly scheduled boat service is considered one of the "streets of the city" within the meaning of section 6-201, would the Interborough Repertory Theatre need to get a franchise to offer entertainment on evening cruises using the theater's own boat?

This is a discussion about what "streets of the city" means. Focus on those words, and use the tools explained in this chapter.

Because statutes are drafted to govern wide ranges of factual possibilities, a rule expressed entirely in statutory language may need to be reformulated for a specific application.

For example, consider a bomb-disarming robot capable of moving on its own treads. A police department might own one of these robots. If someone spots a suspicious package on a street corner, the police might clear the area, take cover themselves, and send their robot over to investigate.

Suppose your client stole a robot and took it across a state line. It's a small robot powered by a small internal battery. It can't travel very far, and it can't do anything unless it's in view of the police officer holding the remote control. You're writing a memo predicting whether your client will be convicted under the National Motor Vehicle Theft Act. Is the robot a "motor vehicle"? Its purpose isn't to travel. Its purpose is to disarm bombs. It was built to move under its own power only because no one wants to lift it up, carry it over to the bomb, and put it down. Here's the current definition from the statute we discussed earlier:

> an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle designed for running on land but not on rails

Most of this sentence is not helpful. The words "automobile," "automobile truck," "automobile wagon," and "motorcycle" are just examples of "motor vehicles." The issue isn't whether a bomb-disarming robot is one of those things.

What are the elements of the definition for "motor vehicle"? The sentence includes two of them. Something must be "self-propelled," and it must not be "designed for running on rails." In *McBoyle*, the Supreme Court decided that Congress meant to include a third element: Something is a motor vehicle only if it operates primarily on land. In your memo, don't quote the entire sentence from the statute. Instead quote the words to be interpreted and write something like this:

> For the purposes of the National Motor Vehicle Theft Act, a "motor vehicle" is an object that is "self-propelled," that operates primarily on land, and that does not run on rails.

You'll have to explain to the reader that two of these elements are in the Act's words, and that the Supreme Court has held that the third element ("operates primarily on land") is implied because it's inherent in what Congress did.

## Exercise I
## Plagiarism and the Board of Bar Examiners

This exercise is in Appendix A.

## Exercise II
## The Ironwood Tract

This exercise is in Appendix A.

# Working with Precedent

## §9.1 Eight Tools for Working with Precedent

Occasionally, you might have an issue that is entirely resolved by mandatory precedent on point — a case from the highest court in your jurisdiction deciding on facts identical to the ones presented by your client — but that's unusual.

More often the law is uncertain, and you must construct an answer from tangential precedent, using at least some of the following tools:

1. ranking precedent according to the hierarchy of authority and the principles derived from it;
2. formulating rules along a continuum, from the broadest to the narrowest arguable from a precedent's facts and wording;
3. synthesizing fragmented authority into a unified whole and reconciling conflicting or adverse authority;
4. determining policy from precedent;
5. analogizing favorable precedent and distinguishing unfavorable precedent; and
6. testing for realism, as a judge might see your analysis.

Chapter 7 explained the first skill — *ranking precedent according to the hierarchy of authority and the principles that are derived from it.* Chapter 3 (§3.2) explained the second skill — *formulating rules along a continuum from the broadest to the narrowest.* This chapter explains the other four skills.

## §9.2 Synthesis

If no single mandatory precedent settles the rule and explains how to apply it, you would need to *synthesize* several precedents together to provide a unified understanding of the rule. Synthesis is the process of finding collective meaning — what the cases as a group stand for — even though that meaning can't be found in any one individual case.

It's not a synthesis to describe Case A, describe Case B, describe Case C, and then stop. That's nothing more than an annotated list: The raw materials have been held up to view, but they have not been sewn together. To turn it into a synthesis, ask yourself what the cases really have in common under the surface. Identify the threads that appear in all three cases. Then tie the threads together. And organize the analysis around the threads themselves (rather than around the individual cases).

The reader cares more about the threads than about the cases, and an individual case is important only to the extent that it teaches something about a thread. It may turn out that Case B sets out the most convincing proof of whatever is in question; Cases A and D agree and are the only out-of-state cases to have decided the issue; and Case C is a much older decision, standing for the same rule but on reasoning that is less complete than that expressed in Case B. An effective synthesis might explain Case B in full; use Cases A and D to show that foreign authority agrees; and then not use Case C at all (or only if needed to fill in a remaining gap). Make the synthesis clear to the reader. Begin by stating it in an opening sentence that includes the synthesized rule or statement of policy:

> Although the Supreme Court has not ruled on the question, the trend in the Courts of Appeal is to hold that such a prosecution is dismissable where any of four kinds of government misconduct has occurred: . . .

A synthesis like this could take several pages to prove because, typically, no case will consider more than one form of misconduct.

## §9.3 Determining Policy from Precedent

Every legal rule has at least one purpose — a goal the rule is meant to accomplish. That purpose is the rule's *policy*. The policy might be to encourage something useful such as home ownership or preventative health care. Or the policy might be to reduce or prevent something harmful such as pollution or highway crashes.

A rule without policy is pointless. It accomplishes nothing useful. "It is revolting," Justice Holmes wrote, "to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting

if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[1]

Once you know a rule's policy, you can argue that when the rule is applied to your facts, the outcome should be consistent with the policy. Sometimes a court will tell you plainly what the policy is. But more often the policy will be implied in the court's reasoning rather than openly stated. What results does the rule generally cause — directly or indirectly? Does the court seem to treat those results as worthwhile?

## §9.4 Analogizing and Distinguishing

An *analogy* shows that two situations are so parallel that the reasoning that justified the decision in one should do the same in the other. When a court is persuaded by an analogy to precedent, the court is said to "follow" the precedent. To construct an analogy, do the following:

First, be sure that the issue in the precedent is the same one you are trying to resolve.

Second, identify the precedent's determinative facts. Don't look for mere coincidences between the precedent and your facts. Instead, identify the facts that the court treated as crucial and on which it truly relied.

Third, compare the precedent's determinative facts to your facts. If your facts are equivalent to the precedent's facts, you have an analogy. The facts don't need to be identical, but they must be *equivalent*. If one bank robber waved a gun and another waved a knife, the weapons aren't identical, but they are equivalent. They're both deadly weapons.

*Distinguishing* is the opposite of analogy. To distinguish a precedent is to show that two situations are so different that they need not be decided the same way. To distinguish a precedent, go through the same three steps as when analogizing, except that in the third step, you would show that the facts are fundamentally dissimilar.

## §9.5 Testing for Realism

The last skill is that of *testing the result of your reasoning for its realism and reasonableness, looking at your analysis the way a judge would.*

Experience on the bench creates what Roscoe Pound called "the trained intuition of the judge"[2] — an instinct for how the law ought to treat each case to do justice to the parties and the situation. If your analysis seems unrealistic to a judge's intuition, the judge will reject what you have done, using the same

1. O. W. Holmes, *The Path of the Law,* 10 Harv. L. Rev. 457, 469 (1897).
2. Roscoe Pound, *The Theory of Judicial Decision,* 36 Harv. L. Rev. 940, 951 (1923).

analytical tools explained in this chapter. Karl Llewellyn wrote that "rules *guide,* but they do not *control* decision. There is no precedent that the judge may not at his need either file down to razor thinness or expand into a bludgeon."[3] Because the law is hardly ever certain, a judge can always fold back your reasoning and make other analogies, build other syntheses, and so forth — or, worse, adopt the analogies, syntheses, and other constructs proposed by your adversary.

Step back from what you are doing and ask yourself whether the result will seem reasonable and just to the typical judge. Testing for realism requires that you have some understanding of how the judicial mind operates. That may take a long time to come to know fully, but you are learning some of it now through the decisions you read in casebooks and through the writing you do in this course.

## §9.6 An Example of the Precedent Skills at Work

In this example, first we describe the facts as your client has told them to you. Then we provide four precedents. And finally, we explain how you can analyze the precedents.

### §9.6.1 The Client's Story

Megan and Troy Hartley married 14 years ago when both were sophomores in college. Megan dropped out of school and worked for four years at various jobs as a receptionist, a delivery truck driver, and a cashier. She earned the couple's only income while Troy finished college and earned a master's degree in business finance. They have two children, twins born eight years ago and named Ariel and Jason.

Troy now earns $475,000 a year as an investment banker. Megan has a part-time job as a salesperson in an art gallery and earns, on average, about $35,000 a year. Early in the marriage, Megan asked Troy to work less and spend more time with the children so she could find a full-time job and build a career, but he refused.

For the past two years, Megan and Troy have bickered often, and she cannot stand it when the bickering turns into shouting. On three occasions during those two years, Troy struck her, once on each occasion, in the face, at the end of a shouting match.

A few years ago, Troy bought a German shepherd, which he named Debenture. Although Debenture has never, to Megan's knowledge, bitten anyone, he bares his teeth and growls when Troy shouts, and this makes Megan and the children nervous.

3. K. N. Llewellyn, *The Bramble Bush* 180 (1930).

Last Sunday evening, after a weekend of bitter arguing, Troy announced that he had had enough and was leaving. He packed a bag and left.

The art gallery where Megan works laid off half its staff on Monday morning. Megan was able to keep her job, but when she came home from work at six o'clock, she was depressed and worried about whether the gallery would close, throwing her out of work. The children were with Megan's parents.

Troy returned around eight o'clock and told Megan that he had consulted a lawyer and that the lawyer had drafted a separation agreement, which Troy had already signed. The agreement provided that Troy and Megan would live apart, beginning immediately, that they would have joint custody of the children, and that a divorce would be obtained as soon as possible. It provided that Megan get six months of alimony and about ten percent of the value of the couple's property.

Troy put the agreement on the kitchen table and angrily demanded that Megan sign it. Debenture was sitting in the corner, and Megan could see him perk up and become more attentive as Troy's voice became louder.

Troy told Megan that if she did not sign the agreement, he would tell the court that her "artsy friends do drugs in front of Ariel and Jason." Troy added that no one would believe her if she were to deny these accusations because it would be her word against his, and he would make a much better witness than she would. Angrily and in a loud voice, Troy said that the court would therefore take the children away from her and give her none of their property. At this point, Troy was pounding the coffee table, and Debenture was on his feet, staring at Megan attentively. She expected Debenture to start growling if Troy began yelling.

Megan signed the agreement and asked Troy to leave immediately and to take Debenture with him. Troy did so. Megan's friends do not "do drugs."

Megan knows nothing about divorce law. At the time she signed the agreement, she had no idea whether Troy's predictions about divorce and the courts were accurate.

She consulted you a few days after signing the agreement. You believe that if there were no valid separation agreement, a court would probably award Megan sole custody of the children, child support, three to five years of alimony, and about fifty percent of the couple's property.

### §9.6.2 Four Precedents

Prenuptial agreements and separation agreements are contracts. Duress is grounds for voiding a contract. If a court voids a contract, the contract ceases to exist.

Your state's highest court has decided the following cases.[4]

4. The cases are based on *Biliouris v. Biliouris*, 852 N.E.2d 687 (Mass. App. 2006); *Blejski v. Blejski*, 480 S.E.2d 462 (S.C. 1997); *Germantown Manufacturing Co. v. Rawlinson*, 491 A.2d 138 (Pa. Super. 1985); *Hall v. Hall*, 27 N.E.3d 281 (Ind. Ct. App. 2015); *Hamilton v. Hamilton*, 591 A.2d 720 (Pa. Super. 1991); and *Holler v. Holler*, 612 S.E.2d 469 (S.C. 2005).

## RASCHI v. RASCHI
(2006)

Mary Raschi argues that her prenuptial agreement with Timothy Raschi is voidable because of duress.

At the time the parties began dating in mid-1991, Timothy was a physician, and Mary was a home economics teacher. Mary had a child by an earlier marriage. In October 1992, Mary learned that she was pregnant with Timothy's child, and shortly afterward she informed Timothy of the pregnancy. He told Mary that he would not marry her unless she signed a prenuptial agreement, which Timothy's lawyer had drafted. Mary consulted her own lawyer, who advised her not to sign it.

She signed it anyway in December 1992. At that time, Timothy's assets were worth $986,000, and Mary's assets were worth about $100,000. Timothy's income was $332,800 per year, and Mary's income was $87,100 per year. The agreement provided that the individual property of each party remain the party's sole and exclusive property, and that neither party would have a claim to alimony from the other.

Mary and Timothy's child was born in May 1993. During the marriage, Mary was an unemployed stay-at-home mother and the primary caretaker of both children, while Timothy ran his medical practice.

In November 2001, Timothy sued for divorce, asking the trial court to enforce the terms of the prenuptial agreement. Mary argued that she was coerced into signing it due to the circumstances in which she found herself: a pregnant single mother, presented with an agreement shortly before her wedding date and being told that if she did not sign the agreement there would be no wedding.

A person who enters into a contract under the influence of such fear as precludes him from exercising free will and judgment may avoid the contract on the grounds of duress. Coercion sufficient to avoid a contract need not, of course, consist of physical force or threats of it. Social or economic pressure illegally or immorally applied may be sufficient.

Mary's signing the agreement was not the product of coercion or duress. Although the circumstances presented Mary with a difficult choice, those circumstances did not divest Mary of her free will.

## QUISENBERRY v. QUISENBERRY
(2015)

Michael Quisenberry argues that a written agreement between him and Susan Quisenberry is voidable because he signed it under duress.

Michael and Susan married in March 2004. A few weeks later, he was arrested for burglary. In September 2004, he was convicted and sentenced to four years' imprisonment. In December 2004, Susan visited him in prison and told him that she intended to divorce him. Michael

begged her not to, and offered to sign an agreement giving Susan financial protection if they divorced after he was released from prison.

Susan drafted the agreement herself, copying it from form agreements she found online. She mailed it to Michael, and he signed it and mailed it back to her, after which she signed it.

Michael was released in 2008 and returned to live with Susan. The parties separated October 2013. Susan sued for divorce in November 2013 and moved to enforce the agreement. Michael argues that he was under duress because he signed the agreement while incarcerated without access to legal counsel and because Susan threatened to divorce him while he was in prison if he did not sign the agreement.

Duress invalidates a contract if improper external pressure or influence deprived a party of free will so that the party formed the contract involuntarily. Duress does not occur if the victim has a reasonable alternative to succumbing and fails to take advantage of that alternative.

Michael was not under duress when he signed the agreement. The only way to get what he wanted — avoiding a divorce while in prison — was to sign the agreement. But a bargaining disadvantage is not the same thing as duress. He was not deprived of free will.

## FIDRYCH v. SPRINGFIELD MANUFACTURING CO.
(1985)

Joan Fidrych argues that contractual documents she signed are voidable because she signed them under duress.

Robert Fidrych, her husband, was employed by the Springfield Manufacturing Co. as its assistant controller. He embezzled $327,011 from the company. On May 21, 1982, the company discovered the embezzlement and fired him. Joan testified at trial that when he told her of this, her "whole world fell apart."

On May 25, Peter Kulaski, an employee of the company's insurer, came to the Fidrych's house and spent a half-hour with them. He showed them two judgment notes, which are contractual documents, and demanded that both of the Fidrychs sign both notes. Because she had done nothing wrong, Joan was surprised to see her name on the documents. She asked Kulaski if she and her husband would need an attorney. Kulaski said that if the Fidrychs cooperated, there would be no need for an attorney and Robert would not be prosecuted. Joan signed both notes.

A threat to start a criminal prosecution amounts to duress. "Experience indicates that the threat of a well-founded prosecution, likely to result in imprisonment, is usually sufficient to coerce even a brave man." 13 Samuel Williston, *Williston on Contracts* § 1613 (3d ed. 1970).

Kulaski included Joan's name on the judgment notes but did not tell her that he was doing so until minutes before he asked her to sign them.

Joan had already been in a weakened mental state as the result of a recent miscarriage, and was visibly upset during the meeting, having learned of her husband's embezzlement. At the meeting, she was told that if she cooperated, she would have no need for legal counsel. She understood this to mean that if she signed the notes, her husband would not go to jail. She had no reasonable alternative but to sign. Her signature was thus obtained by duress.

### GRANT v. GRANT
(2012)

Alonzo Grant is a U.S. citizen and has always lived in the United States. Ludmila Grant is from Bulgaria. In 2006, the parties met online through social media. They conversed electronically and by phone and on Sept. 5, 2007, Ludmila traveled to the United States to live with Alonzo. Before that date, Ludmila had never been outside Bulgaria. She had almost no money and relied on Alonzo for financial support.

In November 2007, Ludmila became pregnant with Alonzo's child. Her visa would expire on Dec. 4, 2007, and she believed she would have to leave the country unless she married Alonzo. Alonzo showed Ludmila a premarital agreement and said he would marry her only if she signed it. Before signing it, Ludmila attempted to translate it from English into Bulgarian, but was unable to do so because, as she later testified, it "had strange technical language." She made notes while trying to translate, and her notes list words for which she could not find a translation, including "undivided," "equitable," and "pro rata." Ludmila did not hire a lawyer because she had no money to pay for one.

Ludmila signed the agreement on Nov. 25, 2007. The parties were married on December 1, 2007, three days before Ludmila's visa was to expire. The parties separated on Feb. 13, 2010. Ludmila then sued for divorce. Alonzo moved to dismiss her claims for alimony and equitable distribution, claiming they were precluded by the premarital agreement.

The central question with respect to whether a contract was executed under duress is whether, considering all the surrounding circumstances, one party to the transaction was prevented from exercising his free will by threats or the wrongful conduct of another. Whether or not duress exists in a particular case is a question of fact to be determined according to the circumstances of each case, such as the strength or weakness, and age and capacity of the party threatened.

Alonzo knew that Ludmila's visa would soon expire, that she was pregnant with his child, and that she relied completely on him for financial support. We hold that Ludmila signed the agreement under duress and that it is voidable.

### §9.6.3 Using the Precedent Analysis Tools

Below is a discussion of how the tools in this chapter might be used in the Hartleys' situation. At the end of the chapter is an exercise in which you will bring everything together.

**Ranking precedent.** Each case was decided by the highest court in your state and is thus mandatory authority. None of these cases expressly overrules another one. And no case is so inconsistent with an earlier one that the earlier case has been impliedly overruled. The cases come to different results, but that is because some of the facts differ and are distinguishable. The cases enforce rules that are either identical or at least consistent (see synthesizing and reconciling below). No case contains dicta.

**Formulating rules along a continuum from the broadest to the narrowest interpretations.** All the cases enforce a general three-element test for voiding a contract on the ground of duress (see synthesizing and reconciling below). For each case, it's also possible to express instead a narrow version of that rule. For example, *Fidrych* can be cited for the proposition that a contract is voidable for duress if one party threatens another with criminal prosecution.

**Synthesizing and reconciling.** All the cases expressly state or impliedly use the following three-element test:

A contract is voidable for duress if
1. one party threatened or pressured the other
2. the threat or pressure was *wrongful*
   *Raschi*: "pressure illegally or immorally applied"
   *Quisenberry*: "improper external pressure or influence"
   *Grant*: "by threats or the wrongful conduct"
3. the threatened party was thus *deprived of free will*
   *Raschi*: "under the influence of such fear as precludes him from exercising free will and judgment"
   *Quisenberry*: "deprived a party of free will so that the party formed the contract involuntarily"
   *Fidrych*: the Williston quote, "the threat of a well-founded prosecution, likely to result in imprisonment, is usually sufficient to coerce even a brave man"
   *Grant*: "prevented from exercising his free will"

*Grant* expressly holds that this test is to be applied to the circumstances as a whole ("to be determined according to the circumstances of each case, such as

the strength or weakness and age and capacity of the party threatened"). The other cases imply the same thing by the way they explain and analyze the facts.

*Quisenberry* holds that a weak bargaining position — without wrongful threats — does not equal duress ("a bargaining disadvantage is not the same thing as duress" and "Duress does not occur if the victim has a reasonable alternative to succumbing and fails to take advantage of that alternative"). None of the other cases is inconsistent with this.

**Determining policy.** None of the cases expressly states a policy, but you can deduce it from each case's reasoning. You already know, or will learn in the Contracts course, that a contract is formed by a free agreement — a meeting of the minds — between the parties.

Usually one party is stronger than the other. Your cell phone company, for example, has a stronger bargaining position than you do. Unequal bargaining shouldn't prevent enforceable contracts. If it did, few contracts would be enforceable. But in an extreme situation the inequality could become unacceptable if the stronger party has turned the weaker party into a victim unable to exercise free will.

Where the problem is created by threats or pressure, the three-element duress test identifies victims in a way that's consistent with the general policies of contract law. The threatening party must have behaved reprehensibly. The cases say "wrongfully," "illegally," "improperly," or "immorally." And the threat must have prevented a true agreement — a genuine meeting of the minds — by depriving the threatened party of free will.

**Analogizing and distinguishing.** Three facts occur in all the cases and in Megan's story. First, a party or the party's lawyer drafted a contract. Second, that party demanded that the other party sign it. And third, the other party felt under pressure to sign. Beyond that, there are factual differences, which might be analogous to or distinguishable from your client Megan's story. Here they are:

**The threat**

| | |
|---|---|
| *Raschi*: | Timothy threatened not to marry Mary. |
| *Quisenberry*: | Susan threatened to divorce Michael. |
| *Fidrych*: | Kulaski threatened to prosecute Joan's husband. |
| *Grant*: | Alonzo threatened not to marry Ludmila. |

How would you describe the threat Troy made to Megan? Compared to each of the cases, is Troy's threat analogous or distinguishable?

### Circumstances in which the threat was delivered

| | |
|---|---|
| *Raschi*: | Mary was pregnant with Timothy's child. |
| *Quisenberry*: | Michael had just begun serving a four-year prison sentence. |
| *Fidrych*: | Kulaski demanded that Joan immediately sign documents that she had never seen before. She was already distraught because her husband had been fired for committing a crime and because of a recent miscarriage. |
| *Grant*: | Ludmila was pregnant with Alonzo's child. She believed that if he didn't marry her, she would be deported back to Bulgaria. She had limited knowledge of English. She had been in the U.S. for only two months and had never before been outside her home country. |

Compare Megan's circumstances with those in each case, as described above. Are her circumstances analogous or distinguishable?

### Economic disparity between the parties

| | |
|---|---|
| *Raschi*: | Timothy was in a much better position financially, but at the time Mary signed the agreement, she was capable of working at a job and supporting herself. |
| *Quisenberry*: | Not an issue. |
| *Fidrych*: | Not treated as an issue. But the company is obviously in a better position financially than a fired employee. |
| *Grant*: | Ludmila "relied completely on [Alonzo] for financial support." |

Compare Megan and Troy's finances with each case. Is their situation analogous or distinguishable?

### Opportunity to consult a lawyer

| | |
|---|---|
| *Raschi*: | "Mary consulted her own lawyer, who advised her not to sign it." |
| *Quisenberry*: | The court ignored the fact that Michael was "incarcerated without access to legal counsel." |
| *Fidrych*: | Kulaski told Joan that if she and Robert signed the notes, Robert wouldn't be prosecuted, and they wouldn't need a lawyer. |
| *Grant*: | Ludmila had no money to pay a lawyer. She actually tried diligently to translate the agreement into her native language and failed because of the technical terminology. |

Obviously Megan had enough money to consult a lawyer. She hired you shortly after signing the agreement. But did any pressure attributable to Troy discourage her from consulting with you before signing? If so, was that pressure as bad as what happened in *Fidrych* and *Grant*?

To help you keep track of all this, you might make a matrix so you can visualize the comparisons and contrasts.

| | Threat | Threat Circumstances | Economic Disparity | Opportunity to Consult Lawyer | Case Outcome |
|---|---|---|---|---|---|
| *Raschi* | | | | | |
| *Quisenberry* | | | | | |
| *Fidrych* | | | | | |
| *Grant* | | | | | |

When you fill in the facts, the patterns become obvious. (If you do this on a computer, set up the page in landscape mode, because matrices can be wide.)

**Testing for realism.** Based on the cases and Megan's story, you might have developed a tentative theory, based on logic, about whether the Hartleys' separation agreement is voidable for duress.

If you litigate this issue, the trial court's decision could be appealed to the same court that decided *Raschi*, *Quisenberry*, *Fidrych*, and *Grant*. Reading four cases from that court should give you some sense for how its judges instinctively feel — on a human level — about duress in family situations. Will those judges be receptive to your tentative theory? Or will they reject it as unrealistic?

## Exercise I
## Duress

In §9.6.2, is the Hartleys' separation agreement voidable for duress? Why or why not? Explain your reasoning in detail.

## Exercise II
## Emil Risberg's Diary

This exercise is in Appendix B.

# 10 Working with Facts

## §10.1 What Is a Fact?

Consider the following statements:

1. *The plaintiff's complaint alleges* that, at a certain time and place, the defendant struck the plaintiff from behind with a stick.
2. At trial, *the plaintiff's principal witness testified* that, at the time and place specified in the complaint, the defendant struck the plaintiff from behind with a stick.
3. At the conclusion of the trial, *the jury found* that, at the time and place specified in the complaint, the defendant struck the plaintiff from behind with a stick.
4. At the time and place specified in the complaint, *the defendant struck* the plaintiff from behind with a stick.
5. At the time and place specified in the complaint, the defendant *brutally* struck the plaintiff from behind with a stick.
6. At the time and place specified in the complaint, the defendant *accidentally* struck the plaintiff from behind with a stick.
7. At the time and place specified in the complaint, the defendant *committed a battery* on the plaintiff.

Which of these statements expresses a fact?

Statement 1 is an allegation of a fact. Statement 2 is evidence offered in proof of the allegation. Statement 3 is a procedural decision that the evidence proves the allegation. Statement 4 is the fact itself.

This sequence is inherent in litigation. Statements 1 through 3 are actually procedural events like those mentioned at the beginning of Chapter 3. The party seeking a remedy first alleges, in a pleading, facts that, if proved, would merit that remedy (Statement 1). At trial, that party submits evidence — testimony (Statement 2), documents, and other tangible evidence — to persuade the fact finder that the allegations are true. If the fact finder, in this case a jury, is persuaded, the allegations are proved (Statement 3) and become facts (Statement 4).

Statement 5 contains the word *brutally*, which is a subjective characterization. Two people might see the same action, both of them disliking it, but they might characterize it differently. One might consider it brutal. The other might consider it bad behavior but not brutal. If you haven't seen the incident yourself, you should wonder whether the word *brutally* accurately summarizes what happened, or whether it instead reflects the value judgments and preferences of the person who has characterized the incident as brutal. A characterization is not a fact. It's only an opinion about a fact.

Statement 6 includes the word *accidentally.* The defendant might have wanted to cause violence, or he might have struck the plaintiff only inadvertently and without any desire to do harm. With both possibilities, an observer might see pretty much the same actions: the stick being raised, the stick being lowered, the collision with the back. The difference between the two possibilities is in what the defendant might have been thinking or feeling when he struck the plaintiff. If you say that the defendant struck the plaintiff "accidentally," you've inferred what the defendant was thinking at the time. That's a factual inference, a conclusion derived from facts. A factual inference isn't a fact. It's the product of reasoning, in which a fact is one of the raw materials.

Statement 7 is a conclusion of law and is not a fact at all. Battery is a concept defined by the law, and you can discover whether a battery occurred only by consulting one or more rules of law. A conclusion of law is the result of applying law to facts. A factual inference (Statement 6) is based on purely factual reasoning without applying law to facts. "Accidentally" is a factual inference because no rule of law defines an accident. Battery is a conclusion of law because battery is a tort with elements.

The *nonexistence of a fact* can itself be a fact. For example:

8. At trial, *no witness has testified* that the defendant struck the plaintiff deliberately or that the plaintiff suffered any physical or psychological injury or even any indignity.

Here, the absence of certain evidence is itself a fact. Consequently, the defendant might be entitled to a directed verdict because some things have not been proved.

At first, you may have difficulties with four fact skills: (1) separating facts from other things; (2) separating determinative facts from other kinds of facts;

(3) building inferences from facts; and (4) purging your analysis of hidden and unsupportable factual assumptions. When you have mastered these skills, you will be able to make reasoned decisions about selecting and using facts. This section has explained the first skill, and the exercise at the end of this chapter develops it further. The remainder of this chapter considers each of the other skills in turn.

## §10.2 Identifying Determinative Facts

Facts can be divided into three categories. The first is made up of facts that are essential to a controversy because they will determine the court's decision: if a change in a fact would have caused the court to come to a different decision, that fact is determinative. The second is a category of explanatory facts that, while not determinative, are nevertheless useful because they help make sense out of a situation that would otherwise seem disjointed. The third category includes coincidental facts that have no relevance or usefulness at all: they merely happened. In life's randomness, all three categories of facts occur mixed up together in a disorderly mess. But lawyers have to separate out the determinative facts and treat them as determinative.

You have already started learning how to do that in this and other courses, mostly through the analysis of precedent. When, for example, you're asked to formulate the rule of a case, you've begun to develop the habit of isolating the facts the court considered determinative and then reformulating those facts into a list of generalities that — when they occur together again in the future — will produce the same result that happened in the reported opinion. But when you look at a given litigation through the lens of an opinion, you're looking at it *after* a court has already decided which facts are determinative: you are explicating the text of the opinion to learn what the court thought about the facts. We're concerned here with another skill: looking at the facts at the *beginning* of the case, before they are even put to a court, and *predicting* which the court will consider determinative.

## §10.3 Building Inferences from Facts

> The main part of intellectual education is . . . learning how to make facts live.
>
> — *Oliver Wendell Holmes*

Let's return for a moment to Welty and Lutz from Chapter 4 (§4.3).

One of the elements of burglary is the intent to commit a felony within the dwelling. In the jurisdiction where Welty and Lutz live, that element can be satisfied only if a defendant had that intent at the time that any breaking and

entering might have occurred. If the defendant formed the intent for the first time after entering the dwelling, the element isn't satisfied. Assume that Welty broke and entered Lutz's apartment when she opened the door further and walked in. Did she — at the instant she stepped inside — intend to commit a felony there?

Your response may be "Well, let's ask Welty — she's the one who would really know." But things aren't so easy. If you're the prosecutor, you may find that the police have already asked her that question and that she has refused to answer or has given an answer that the police consider self-serving. In fact, you will rarely have direct evidence of a person's state of mind. People don't carry electronic signboards on their foreheads on which their thoughts can be read at moments the law considers important. Instead, as the prosecutor you would have to prove Welty's state of mind through the surrounding circumstances — for example, through the things she did or didn't do, as well as the things she knew other people had or hadn't done. Although her state of mind would be easier to determine if she had appeared at Lutz's door with weapons — or, in another situation, with safecracking tools — inferences can be built from circumstances even without such dramatic displays of intent.

Even if you're Welty's defense lawyer and can freely ask her when she formed an intent to hit Lutz, you might not be much better off than the prosecutor. She might tell you something like the following:

> I don't know when I decided to punch him. I had to listen to his loud music on his four-foot concert speakers for two or three hours while I was trying to study for Civil Procedure. At least once or twice during that time, I thought that it might be nice to punch his lights out, but I don't know that I had decided then to do it. When I knocked on his door, I thought, "This guy had better be reasonable, or else" — but at that instant I don't know whether I was committed to punching him. When I pushed the door open and stepped inside, I thought that he might learn a little respect for the rest of us if something very emphatic happened to him — something that might help him remember in the future that other people have needs and that he shouldn't be so self-centered. Even then, I wasn't certain that I was going to do anything except try to reason with him. But when he ordered me out, I decked him. Nobody ever told me that I was supposed to make sure that my thoughts fit into this "state of mind" thing you're telling me about. I have no idea when I "formed an intent" to hit him. I can only tell you what my thoughts were at each step in the story. You're the lawyer. You tell me when I "formed an intent."

Now the problem is something else: a party's thoughts don't mesh nicely with the law's categories of states of mind. Welty's sequence of emotions somehow culminated in an action, but there seems to have been no magical moment at which anger crystallized into a decision that the law might recognize as "intent." A defense lawyer handles this problem in the same way that a prosecutor deals with the absence of direct evidence. Each lawyer will build inferences from

the circumstances surrounding Welty's actions. As Welty sees the arguments unfold, she might conclude that the law is doing strange and perhaps arbitrary things in categorizing her thoughts. But the law must have a way of judging states of mind, and it relies heavily on circumstances.

## §10.4 Identifying Hidden and Unsupportable Factual Assumptions

David Binder and Paul Bergman have pointed out that, "[i]f in medieval times there was 'trial by combat,' then today we have 'trial by inference.'"[1] Your adversary and the court will mercilessly challenge your inferential streams, looking for weaknesses in the way they were put together. You must purge your analysis of hidden assumptions that won't stand up to scrutiny when exposed. Consider the following:

> Detective Fenton Tracem rushes breathlessly into the office of the local prosecutor, Les Gettem, eager to persuade Les to issue an indictment. Fenton describes the evidence he has uncovered:
>
> > Les, we've got a good case for bank robbery against Clyde. The gun the robber used and dropped at the door was originally purchased by Clyde. The owner of A-1 Guns can definitely identify Clyde as the purchaser and the teller can identify the gun. . . . Two days after the robbery Clyde moves out without giving Ness, his landlord, his two neighbors, Capone and Siegel, or the post office his new address. . . .
>
> The detective has disgorged a mass of circumstantial evidence which appears in the aggregate to be quite convincing. The prosecutor cannot, however, be content to rely on this presentation. In order to analyze the probative value of the evidence, Gettem must first expressly articulate the generalization which links each item of evidence to an element.
>
> [E]xpressly articulating generalizations is the key to determining just how strong a piece of evidence is.
>
> Consider, therefore, the generalization the prosecutor might articulate for the first piece of evidence, that the gun used and dropped by the robber was originally purchased by Clyde. The generalization might be something like, "People who have purchased a gun subsequently used in a robbery are more likely to have participated in the robbery than people who have not."[2]

How accurate is this generalization? See what happens when you compare it with either of two other strings of generalizations. Here's the first one: "Robbers don't feel morally compelled to pay for what they acquire. Because guns can be

1. David A. Binder & Paul Bergman, *Fact Investigation: From Hypothesis to Proof* 82 (1984).
2. *Id.* at 92-93.

stolen, a robber has no need to pay for a gun." Here's the second string: "Robbers plan their crimes. A robber can foresee the possibility of losing control of a gun during the robbery. A robber can also foresee that a gun legally purchased from a merchant might be traced back to the robber. Clyde is bright enough to have realized this." Both strings seem more believable than "People who have purchased a gun subsequently used in a robbery are more likely to have participated in the robbery than people who have not" — and *either* string might overcome and negate the generalization on which the detective relies.

> In the beginning years of practice, one must force oneself to articulate explicitly the generalizations on which one relies, for it is not a skill practiced in everyday life. In fact, there is a word for people who state the generalizations underlying all inferences they make: bores. But in the privacy of one's office, one should expressly identify the premises on which one relies [because] by articulating the underlying generalization one can consciously consider the question of how strongly it is supported by common experience. . . .
>
> [A]rticulating generalizations . . . may bring to mind potential exceptions. . . . [O]ne method of testing the degree to which common experience uniformly supports a generalization is to add "except when" to a generalization, and see how many reasonable exceptions one can identify. . . .
>
> [For example, consider] a generalization that one might make in Clyde's case: "People who move without leaving a forwarding address are usually trying to avoid detection." By adding "except when," one sees that this generalization is subject to many exceptions and is therefore less likely to be persuasive. People may be trying to avoid detection, except when they simply forget to leave a forwarding address, or except when they do not yet know the permanent address to which they will be moving, or except when they will be moving around for a time and will not have a permanent address.[3]

When you build and test your own inferences, don't commit to paper much of the analysis Binder and Bergman describe. It's thinking reserved for the privacy of your own office.

But things are different when you attack your adversary's inferences. If Clyde becomes your client, you might argue that a directed verdict should be — or, on appeal, should have been — granted because a rational jury would not be able to find guilt beyond a reasonable doubt. In a supporting memorandum or in an appellate brief, you might write, "The evidence that he moved without leaving a forwarding address does not tend to prove guilty flight. It could just as easily prove that he forgot to leave a forwarding address, or that he did not yet know his new permanent address when he moved, or that he would be moving around for a time without a permanent address."

3. *Id.* at 93-96.

## Exercise
## The Menu at the Courthouse Cafe

The following items appear on the menu at the Courthouse Cafe. Decide what is a fact, what is a characterization, and what is a conclusion of fact. (If part of an item is factual and part is not, decide exactly where the fact ends and the non-fact begins.)

Hot, steaming coffee
Healthful oat bran muffins
Pure beef hot dogs
Garden-fresh vegetables
Hand-picked huckleberries
Home-made huckleberry pie
Delicious peanut butter ice cream

# ORGANIZING PROOF OF A CONCLUSION OF LAW

# 11 A Paradigm for Organizing Proof of a Conclusion of Law

## §11.1 Why We Need to Organize Proof of a Conclusion of Law

A conclusion of law asserts how the law applies to facts or resolves a legal question. In both predictive and persuasive writing (Chapter 4), you establish a conclusion of law by explaining the law and the facts in ways that show the reader that your conclusion is the right one. Organizing what you say is essential to convincing the reader that your analysis is sound. This chapter, and Chapters 12-14, explain how to organize legal analysis and how to check your writing to see whether it is organized effectively.

A supervising lawyer who reads a predictive Discussion in an office memorandum (Chapters 4 and 16) does so in preparation for making a decision, such as how to advise a client or whether to take a particular action in a case. A judge reads persuasive writing in a motion memorandum or appellate brief to decide how to rule on a motion or appeal. Your written legal analysis should make it easy for your reader to understand your conclusion and the reasoning behind it. Lawyers use a particular paradigm structure for legal analysis, and organizing your analysis in the way the reader expects will make it easier for your legal reader to understand. What will you say first? What will you say after that? How will you organize everything? And how much detail will you provide? Those questions are answered in the chapters in this section.

## §11.2 A Paradigm for Structuring Proof

Lawyers and law professors use many different terms to represent the paradigm structure for legal analysis. You may see acronyms such as *IRAC* (*I*ssue, *R*ule, *A*pplication, *C*onclusion), *CREAC* (*C*onclusion, *R*ule, rule *E*xplanation, rule *A*pplication, and *C*onclusion), *CRAC* (*C*onclusion, *R*ule, *A*pplication, and *C*onclusion) and *CRuPAC* (*C*onclusion, *Ru*le, *P*roof of Rule, *A*pplication, and *C*onclusion). Whatever you call it, it represents the organization that legal readers expect to see when you are showing how you arrive at a conclusion of law.

A legal reader will want to see where you are going, understand the governing legal rules and how to satisfy them, and see how those rules apply to the client facts to lead to your conclusion. That is the basic idea behind the paradigm structure, and keeping in mind the purpose will help you with organization.

**To prove a conclusion of law:**

1. State your conclusion.
2. State the primary rule that supports the conclusion and prove that it is binding with citation to authority.
3. Explain and illustrate the rule through description of how the authority stands for the rule, discussion of underlying principles and reasoning, examples of how the rule has applied to facts, analyses of policy, and counter-analyses.
4. Apply the rule to the facts using the terms and concepts identified in the explanation.
5. If steps 1 through 4 are complicated, sum up by restating your conclusion.

What do the ingredients in this formula mean? Consider this hypothetical. You represent Jansen, who was injured in a car accident because Richardson ran a red light on a busy state road. In the relevant case, *Jones v. Smith,* the court held that a driver who drove over the speed limit on a highway during a snowstorm engaged in "dangerous driving" and was therefore liable to the person he injured.

**Conclusion:** the conclusion provides a direct answer to the legal question you are addressing. For example, "Richardson will likely be liable to Jansen because Richardson engaged in dangerous driving."

**Rule:** state the principal rule on which you rely in reaching your conclusion, including any components (elements, factors, etc.). Other rules might also be involved, but this is the main one on which your analysis rests. In our

hypothetical, the rule might be something like "A person engages in dangerous driving if he violates traffic laws in a situation likely to cause an accident."

**Rule proof and explanation:** this is the heart of the analysis and serves multiple purposes. First, the proof demonstrates that the rule you identified is the correct law in the jurisdiction involved. The reader needs to know for certain that the rule exists in the jurisdiction, and that you have expressed it accurately. You show this through citations to authority, such as statutes and precedent, together with explanations of how that authority stands for the rule as you have stated it, explanations of policy, and counter-analyses. The more unsettled the law is, the more support you need to establish the controlling rule.

Second, the explanation illustrates how the terms of the rule can be satisfied. This may be simple if the terms are clear and concrete — for example, "a driver may not exceed 25 miles per hour on a residential street." But if the terms are unclear, such as "dangerous driving," the rule explanation may require you to provide definitions, reasoning from previous cases, and examples of how courts have applied the rule to facts in precedent cases to show the reader how the *courts* define "dangerous driving." This is important because what the courts find is "dangerous driving" might be different from what you assume that term means. Therefore, in our hypothetical, you need to illustrate the rule by describing what the *Jones* case said. For example, "In *Jones*, the defendant engaged in 'dangerous driving' because he drove above the speed limit and did so during a snowstorm. The court found that because speeding during a snowstorm is likely to cause an accident, the defendant is liable to the plaintiff." This summary of *Jones* would be followed by citations to *Jones*.

**Policy** is the rule's reason for being. Laws are designed to accomplish a purpose (such as preventing a particular type of harm). When courts are unsure of what a rule means or how to apply it, they interpret the rule in the way that would be most consistent with the purpose behind it. Thus, policy can be used to show both why the rule applies (proof) and how it applies (illustration). In our hypothetical, perhaps the *Jones* case reasons that the "dangerous driving" rule is meant to prevent injuries on the roads. You might mention that to strengthen the analogy between running a red light and driving over the speed limit.

**Application:** demonstrates that the rule + the facts = your conclusion. Explain your logic, drawing on the terms, reasoning and illustration from your explanation. You can make specific comparisons between your case and the case law. In showing why the facts satisfy the legal requirements of the rule, you might echo the concepts introduced in the explanation, or you might make explicit reference to authority you presented in the explanation. In our hypothetical, your application might say something like: "Richardson engaged in dangerous driving by running a red light on a busy street. Like the driver in *Jones,* Richardson violated a traffic law in circumstances likely to cause an

accident. Exceeding the speed limit during a snowstorm is analogous to running a red light on a busy street, because it creates dangerous conditions for other drivers."

If you wanted to add something about policy, you might add: "Both speeding during a snowstorm and running a red light on a busy street are likely to cause injuries on the roads. Therefore, under the reasoning of *Jones,* Richardson engaged in dangerous driving."

**Counter-analysis** is an objective evaluation of any reasonable alternative analysis, with an honest report of its strengths and weaknesses. You must report whether your conclusion can withstand attack. And you must consider the possibility that other analyses might be better than the one you have selected. Counter-analysis is not always necessary. Don't waste the reader's time by evaluating marginal or far-fetched arguments. Like authority and policy, counter-analyses can appear both in rule explanation and in rule application — but for different purposes. (In persuasive writing in a motion memo or appellate brief, a counter-analysis is called a *counter-argument.* It doesn't objectively consider contrary points of view. It argues against them, stressing their weaknesses and showing their strengths to be unconvincing.)

In our hypothetical, you might have to do counter-analysis if another case, *Williams*, held that running a red light on a deserted country lane was *not* dangerous driving. In your rule explanation, you would describe the holding and reasoning of *Williams*. Then, in your application, you might say something like: "*Williams* is distinguishable because the traffic violation occurred on a deserted country lane where it was unlikely to cause injury. In our facts, by contrast, Richardson's traffic violation is more likely to cause injury than doing so on a deserted road."

## §11.3 Why Legal Readers Prefer This Type of Organization

Remember that your legal readers will be practical and skeptical people, and will be reading your memo or brief because they must make a decision.

State your conclusion first, because a practical and busy reader needs to know what you're trying to support before you start supporting it. Your reader may become frustrated and annoyed trying to understand why you are including information if you haven't yet stated what the information is intended to prove. Effective legal writers state their conclusions boldly at the beginning of a Discussion or Argument ("The plaintiff has a cause of action because . . ."). This may take some getting used to. It's different from the way writing is often taught in college. New legal writers often worry that this approach will seem presumptuous or patronizing to the reader. Far from being offended, however,

the reader who has to make a decision is grateful not to be kept in suspense. They expect to see the conclusion first, and you should meet that expectation.

State the rule next, because, after reading a conclusion of law, the skeptical law-trained mind instinctively wants to know what principles of law require that conclusion instead of others. After all, the whole idea of law is that things are to be done according to the rules.

Then establish and explain the rule because the reader will refuse to follow you further until you've established that the rule is what you say it is and until you've educated the reader somewhat on how the rule works. The skeptical law-trained mind won't accept a rule statement as genuine unless it has been proved with authority. And you can't apply a rule that the reader has not yet accepted and understood.

Apply the rule last. At this point, the reader knows the law and knows the client's facts. Your application puts them together.

Along the way, counter-analyze opposing arguments (when reasonable), because the skeptical law-trained mind will be able to think up many of those arguments and will want them evaluated. Almost every train of reasoning can be challenged with reasonable arguments. If you don't account for them, the reader will doubt you, because it will look as though you're avoiding problems rather than solving them.

## §11.4 Varying the Paradigm Formula to Suit Your Needs

The paradigm structure is a tool to *help* you organize, not a hard-and-fast formula. It can be varied in many ways, although you should do so only for good reasons. It is not wise to alter the order of the paradigm elements until you become more experienced, but you can make some variations in the structure set out in §11.2.

First, in the rule proof, illustration and application, you can vary the depth of your explanation to suit the amount of skepticism you expect from the reader. (See §11.4.1 and Chapter 12.)

Second, you can combine multiple paradigm structures into a unified explanation of several issues and sub-issues. (See §11.4.2 and Chapter 13.)

### §11.4.1 Varying the Depth

In rule explanation and illustration, some statements about the law are complicated and others aren't. A simple concept like "a driver may not exceed 25 miles per hour on a residential street" doesn't need as much explanation as a rule that contains ambiguous terms, such as "a driver is liable when they cause an accident because of reckless driving." When the rule is controversial,

the terms of the rule are ambiguous, or your client's facts are very different from the precedent, you need more detail to illustrate how to know when the rule is satisfied.

The same is true about rule application. You need to write more analysis if the reader will be skeptical that the rule should be applied as you say and less if the reader will easily see the point.

Chapter 12 explains how to expand or contract analysis, and how to decide when to expand or contract it.

### §11.4.2 Combining Separately Structured Analyses

If you reach several conclusions or sub-conclusions, the reader will need a separately structured proof for each one.

For example, suppose you represent the plaintiff in a negligence lawsuit. Negligence has four elements: (1) a duty owed by the defendant to the plaintiff, (2) the defendant's breach of that duty, (3) an injury suffered by the plaintiff, and (4) proximately caused by the breach. To succeed at trial, you'll need to prove all of the elements. If you're writing an office memo predicting a successful outcome, in addition to the overall conclusion, you will need to make a conclusion for each element:

1. We can prove a duty owed by the defendant to the plaintiff.
2. We can prove a breach of that duty.
3. We can prove that the plaintiff suffered an injury.
4. We can prove that the breach proximately caused the injury.

Each of these predictions is a separate conclusion of law. Each will require its own separate structure, which you can combine into a single unified presentation that supports an overall conclusion ("The plaintiff has a cause of action for negligence"). Chapter 13 explains how.

#### Exercise
#### Changing Planes in Little Rock

Wong sued Keating in an Arkansas state court. Wong has never lived in Arkansas, and none of the events that led to the case occurred there. The only time Keating has ever been in Arkansas was a 45-minute layover at the Little Rock airport en route to a job interview in Shreveport, Louisiana. During those 45 minutes, while Keating was walking between gates, a process server, acting on Wong's behalf, served Keating with a summons and complaint in *Wong v. Keating*. Keating moved to dismiss the claim for lack of personal jurisdiction. Wong argues that service within Arkansas alone gives Arkansas personal jurisdiction over Keating.

Below is an analysis of this issue. Find the components of the paradigm for organizing proof of a conclusion of law. Find the writer's conclusion; the primary rule that supports that conclusion; proof and explanation of that rule; and the application of that rule to the facts. Mark up the passage below to show where each of the components occurs. If you can find any counter-analyses or policy discussions, mark them, too. Finally, for each component, ask yourself whether the writer has told you enough. Are you confident that the writer is correct? If not, what kinds of additional information would you need?

Arkansas has personal jurisdiction over Keating. Under the Due Process Clause of the Fourteenth Amendment, a state is authorized to exercise personal jurisdiction over a defendant who is served with a summons while the defendant is voluntarily inside the state. *Burnham v. Superior Court*, 495 U.S. 604 (1990). That is true even if service of the summons is the only connection between the state and the plaintiff, the defendant, or the plaintiff's claim. The state has jurisdiction even if the defendant does not reside in the state, is only traveling through the state, and has no connection to the state except for the trip during which the defendant was served and even where none of the events or circumstances alleged in the plaintiff's complaint happened in the state. *Id.*

The defendant in *Burnham* was a New Jersey resident who had traveled on business to southern California and then to northern California to visit his children. The plaintiff was the defendant's wife, who had him served in a divorce action while he was in northern California. A plurality of the Justices held that, under precedent going back two centuries, a state has "the power to hale before its courts any individual who could be found within its borders." *Id.* at 610. A different plurality held that the defendant's presence in the state at the time of service was a purposeful availment that satisfies the minimum contacts requirements of *International Shoe*. *Id*. at 630 (citing 326 U.S. 310 (1945)). The ninth Justice concurred separately on the ground that both rationales are correct. *Id.* at 640. Because there was no majority opinion, it is not settled which rationale supports the rule, although the rule had the unanimous support of all nine justices.

Regardless of the rationale, the effect here is that service on Keating in the Little Rock airport created personal jurisdiction in Arkansas. Keating was present in Arkansas at the moment of service. The process server's affidavit is evidence of that, and Keating concedes it. Moreover, she does not claim that she did not know she was in Arkansas or that she was in the state under duress. She had bought her airline ticket knowing she would have to change planes in Little Rock, and her presence was therefore voluntary.

Keating argues, however, that she was not in Arkansas long enough to be subject to the state's jurisdiction, even if she was served in Arkansas. She points out that, unlike the *Burnham* defendant, who had traveled *to* California to conduct business there and visit his children, her destination was Louisiana rather than Arkansas, and because she was on the ground in Arkansas for less than an hour and only for the purpose of getting to Louisiana, her situation is distinguished from *Burnham*.

This case cannot be distinguished from *Burnham*. The Court agreed that the state's jurisdiction extends to any visitor, "no matter how fleeting his visit." *Id.* at 610. And the *International Shoe* rationale would treat using the Little Rock airport for a connecting flight as purposeful availment supporting minimum contacts because Keating gained a benefit from Arkansas. Any other result would represent unsupportable policy in an era of modern travel. There is no practical way to craft a rule that would clearly distinguish between a presence in the state that is too short for jurisdiction and a presence that is long enough, which is why the Supreme Court held in *Burnham* that any presence is enough if the defendant is served while present.

Moreover, Keating's presence in Arkansas was not limited to her 45 minutes inside the airport. She could have been validly served while either of the airplanes on which she flew was on the tarmac, or even in the air over Arkansas. Service of process on a passenger in an airplane that flew over Arkansas but never landed in the state has been sustained, because at the moment of service, the passenger was inside Arkansas, even though the passenger was not on the ground. *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959). The *Grace* court reasoned that there is no real difference between a passenger on an airplane that passes through Arkansas airspace and a passenger who travels through the state by train or bus without disembarking. *Id.* at 447.

Thus, Arkansas has jurisdiction over Keating, and her motion to dismiss should be denied.

# Varying the Depth of Rule Explanation and Rule Application

## §12.1 Introduction

Chapter 11 explained a paradigm for structuring proof of a conclusion of law. This chapter explains how to vary two parts of that paradigm — rule explanation and rule application — in terms of depth.

Depending on the legal issue, rule explanation and rule application can range from a few sentences to a few pages. You might illustrate the rule in a sentence or two and need much longer for the application, or vice versa. How can you tell how much depth is needed? Ask yourself three questions:

First, how much explanation will convince the reader that the conclusion is correct? That depends on how important the issue is to the decision the reader must make, how complicated the rule is, and how clearly the facts satisfy the requirements of the rule. A reader is more likely to feel the need for more detail with a critical, difficult, or obscure point than with a simple, peripheral, or routine one. A reader's need to know more is particularly great for authority that is the only support or the central basis for your conclusion.

Second, how much explanation will allow the reader to form an independent judgment about your conclusion without checking the authorities you rely on? Your job is to give your reader enough information to form her own independent conclusion, whether that is agreement or disagreement. This

question poses what might be called the "need-to-read test"; you haven't explained enough if your reader would find it hard to evaluate your conclusion and analysis without actually reading the authorities you've cited.

Third, how much explanation would tell the reader enough to make an informed decision? Your job is to research, read and analyze the relevant authority and decide what information is important. The reader is counting on you to cut out the things that don't matter. But don't leave out so much that the reader is deprived of some of the information on which a decision would have to be based. Put another way, if the reader were to go to the authorities, would the reader be startled to find the things you've left out?

At the same time, don't explore an issue in more depth than a reader would need. Remember that the reader is a busy person who has asked you to do the hard work of deciding what is relevant so they don't have to. If you include too much detail about peripheral issues, or about routine propositions with which the reader will easily agree, your reader will be frustrated.

New legal writers have difficulty figuring out the right level of detail. If you have no idea how much to explain, err on the side of making a more complete explanation until you have gained a better sense of what must be fully proven and where proof can be at least partially implied. You will improve with experience.

Rule proof and rule application can each be explored in a way that's *conclusory*, *substantiating*, or *comprehensive*. The rest of this chapter explains how based on the following hypothetical:

> Angelica Reyes is a first-year law student and a skilled computer programmer. She specializes in making bots.
>
> Bots scan the Internet for specific types of websites and then automatically perform actions on those sites. For example, Google uses bots to index websites and improve search results. Bots can also be disruptive, such as bots that try to snatch up the best seats as soon as they become available on concert websites.
>
> Just before the start of the fall semester, Reyes created a bot that searched for websites where people could post comments. Whenever it found one, the bot posted a comment — actually an ad — for businesses that were paying Reyes for clicks or traffic. The ads promoted things like limited-edition sneakers, refurbished smart devices, and discount travel deals. Once launched, the bot ran entirely on its own, letting Reyes read for her classes while it worked in the background. Her goal was to generate some steady side income during law school.
>
> Many websites require users to agree to "Terms & Conditions," which usually appear in a pop-up or are linked on the homepage. Users have to click an "I Agree" or "I Accept" button to move forward. Most people never read the fine print — but in many cases, these click-through agreements (also called "clickwrap" contracts) are legally binding. Clicking "I Agree" functions like signing a contract.

In late September, a sheriff was waiting for Reyes outside of her Civil Procedure class and served her with some legal documents. The Civil Procedure teacher asked to see the documents and told Reyes she had been served with a summons and complaint — and that's how civil lawsuits officially begin. Reyes was stunned.

The plaintiff is ExitRow.com, Inc., a travel planning website. One part of the site helps users compare airlines based on reliability for different routes. Another section hosts message boards, where users can post about travel topics like carry-on rules and TSA procedures. Near the top of ExitRow.com's Terms and Conditions is a line that says: **"The User promises not to post advertising on this website or use the website for commercial purposes in any way."** These terms appear in a pop-up window on the homepage, and the site doesn't let anyone access other parts of the site unless they click "I Agree." Reyes had programmed her bot to automatically click through any such prompts it encountered. The bot wasn't designed to read or interpret contract terms — it simply clicked and moved on.

ExitRow.com's lawsuit claims that Reyes's bot posted hundreds of unauthorized comments, and that she had violated the site's terms. The company is seeking damages for breach of contract. Reyes has hired your law firm to defend her, and your research shows that this dispute is governed by California law.

"I never agreed to anything," Reyes says. "I've never even seen their contract. I didn't promise not to advertise on their site. How can I be bound by a contract I didn't read?"

Is Reyes legally bound by ExitRow.com's terms and conditions?[1]

## §12.2 Conclusory Explanations

A conclusory explanation does no more than allude to some basis for the deduction made by the writer. Here's an example:

> Reyes is contractually bound to ExitRow.com's Terms and Conditions because she programmed her bot to click through the "I Agree" pop-up on ExitRow.com's website. A contract is formed by an objective manifestation of agreement, even if a party does not read the contract before agreeing to it. *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.*, 107 Cal. Rptr. 2d 645, 651 (Ct. App. 2001). Programming a bot to click on an "I Agree" button is analogous to signing a contract without reading it.

1. This fact pattern's development benefitted from suggestions by Kenneth Chestek and David Thomson.

This sample starts with the conclusion and then sets out the rule with a citation. But the writer hasn't illustrated the rule by presenting the court's reasoning or showing how the court viewed the facts of the case. The only rule application is an allusion to a single fact: Reyes programmed her bot to click through the "I Agree" pop-up on ExitRow.com's website. There is no discussion of how or why the facts are analogous to those in the precedent case. This is conclusory because it asserts the rule and conclusion without giving the reader an understanding of the thought process that connects them. A conclusory explanation is appropriate only where the reader will easily agree with you — for example, a conclusion that a driver was exceeding the speed limit by driving 40 mph in a 25-mph zone — or where the point isn't important to your analysis. In those situations, a detailed analysis would seem tedious to the reader. In this sample, however, the conclusory explanation deprives the reader of information essential to the decision the reader must make. For example, from the example above, a supervising lawyer cannot explain to Reyes why her situation represents "an objective manifestation of agreement." At the very least, the lawyer would want to know the facts of *Marin Storage & Trucking,* how they're analogous to website clickwrap agreements, the court's reasoning in *Marin,* and whether any cases have decided whether bots can create contracts.

## §12.3 Substantiating Explanations

A substantiating explanation goes more deeply into the writer's reasoning, but still doesn't state the analysis completely:

> Reyes is contractually bound to ExitRow.com's Terms and Conditions. A contract is formed by an objective manifestation of agreement, even if a party does not read the contract before agreeing to it. *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.*, 107 Cal. Rptr. 2d 645, 651 (Ct. App. 2001). In *Marin*, the company was bound when its employees signed contractual documents without reading them. *Id.* In website clickwrap contracting, a person agrees to a website's terms and conditions if he programs a bot to do something that he knows the website will interpret as agreement. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004). Reyes programmed her bot to click "I Agree" and "I Accept" automatically wherever the bot found them, which is what the bot did on ExitRow.com's website. That is analogous to signing a contract without reading it.

This passage provides the same information as the conclusory passage, and also adds facts from the precedent case to illustrate the rule and more facts about Reyes in the application. But it's not comprehensive because it still does not identify precisely why the two situations are analogous.

A substantiating explanation is appropriate where the reader needs more than a conclusory explanation, but where the point being made isn't really

central to your analysis. It isn't appropriate where the reader will probably be aggressively skeptical. The substantiating passage above would not satisfy the lawyer who must make decisions about how to handle Reyes's case.

## §12.4 Comprehensive Explanations

A comprehensive explanation includes in-depth analysis designed to satisfy the most skeptical reader and support a conclusion when the law and/or facts are ambiguous. The rule explanation can be augmented with a more detailed illustration of the reasoning in the precedent cases, along with policy to support and explain the rule's purpose. The application can be deepened with a more explicit comparison of your client's facts to the precedent and with counter-analysis sufficient to give the skeptical reader confidence that the law's goals would be achieved through your conclusion.

The writer's conclusion.

Reyes is contractually bound to ExitRow.com's Terms and Conditions because she programmed her bot to agree to them.

The main rule.

A contract is formed by an objective manifestation of agreement, even if a party does not read the contract before agreeing to it. *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.*, 107 Cal. Rptr. 2d 645, 651 (Ct. App. 2001). Marin often supplied construction cranes to Benco at building sites. After each day, Marin's crane operator wrote the number of crane-usage hours on a form and handed it to a Benco employee, who confirmed the hours and signed the form. At the top of the form were the words "Work Authorization and Contract," and at the bottom was the sentence "This is a contract which includes all terms and conditions stated on the reverse side." There was no evidence that any of the Benco employees who signed the form ever read the reverse side. *Id.* at 649-50. The court held that Benco's employees objectively manifested agreement when they signed a document with words warning that it was contractual. *Id.* at 651. Whether they read the terms of the contract was irrelevant. *Id.*

Rule proof and explanation begin.

This case is consistent with the Restatement view that "where an offer is contained in a writing either the offeror or the offeree may, without reading the writing, manifest assent to it and bind himself without knowing its terms." Restatement (Second) of Contracts, § 23, cmt. b (1979). The policy behind this rule is to protect a party who relies on the agreement from a later argument by the other party that no contract exists because the other party had not read or understood it. *Id.* cmt. e.

Policy is introduced.

Reyes is an experienced programmer and knows that websites often require users to agree contractually to terms and conditions. She could have visited ExitRow.com's website personally and read ExitRow.com's Terms and Conditions. Instead, she programmed this bot to click through "I Agree" and "I Accept" screens automatically wherever the bot found them. This is the equivalent of the Benco employees signing a contract without reading it.

Rule application begins.

No California court has decided a contract case involving a bot. But in a case applying California law, the Second Circuit held that a website visitor is not bound to a contract the visitor has not read, unless the website informs the visitor that a particular action constitutes agreement to that contract, and the website allows the visitor to read the contract before agreeing to it. *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002). Netscape claimed that the plaintiffs had agreed to all of its contract by downloading Netscape's software. *Id.* at 23. Although the website gave notice of some contract terms, a visitor would have had to search the site exhaustively to discover others, including the ones at issue in the lawsuit. *Id.* at 23-24. The court held that the plaintiffs were not bound by the additional terms because "a reasonably prudent Internet user in circumstances such as these would not have known or learned of [their] existence." *Id.* at 20.

A counter-analysis begins.

The Second Circuit later held that a person agrees to a website's terms and conditions if he programs a bot to do something that he knows the website will interpret as agreement. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004) (applying California law). Verio programmed its bot to visit Register.com's website several times a day and collect web addresses, to which Verio then sent marketing solicitations. *Id.* at 396-97. Register.com's website contained this notice: "By submitting a . . . query, you agree that . . . under no circumstances will you use this data to . . . support the transmission of mass unsolicited, commercial advertising or solicitation via email." *Id.* at 396. Because Verio's bot had been programmed to collect web addresses despite the notice, Verio was contractually obligated not to use them for email marketing. *Id.* at 404. The court distinguished its earlier decision in *Sprecht* on the ground that in that case, Netscape had designed its website so that visitors would not have known they were agreeing to additional terms. *Id.* at 402.

To show why *Specht* does not control, the writer explains the most analogous case.

*Register.com* is the only case that applies California contract law to bots. Like Verio, Reyes programmed her bot to behave in a way that a website would interpret as agreement to the site's terms and conditions. She thus agreed to, and is bound by, those terms and conditions.

A wrap-up restating the conclusion.

## §12.5 Beware Cryptic Explanations

Beginners sometimes write explanations so cryptic as to be less than conclusory. The following passage is typical of the kind of mistake new legal writers make by trying to do too much at once: Reyes is contractually bound to ExitRow.com's Terms and Conditions. *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.*, 107 Cal. Rptr. 2d 645, 651 (Ct. App. 2001).

A cryptic explanation is never enough — even in a situation where a conclusory explanation would suffice — because a cryptic explanation omits any statement of the rule on which the conclusion is based.

## Exercise
## Punitive Damages and Bedbugs

This Exercise is divided into Exercise A and Exercise B, below. To do each exercise, you'll need the facts in *Matthias v. Accor Economy Lodging*, 347 F.3d 672 (7th Cir. 2003). Here they are, in the court's words:

> . . . The plaintiffs . . . were guests [in the defendant's Motel 6] and were bitten by bedbugs, which are making a comeback in the U.S. as a consequence of more conservative use of pesticides. . . . The jury . . . awarded each plaintiff $186,000 in punitive damages though only $5,000 in compensatory damages. . . .
>
> . . . In 1998, EcoLab, the extermination service that the motel used, discovered bedbugs in several rooms in the motel and recommended that it be hired to spray every room, for which it would charge the motel only $500; the motel refused. . . . By the spring of 2000, the motel's manager "started noticing that there were refunds being given by my desk clerks and reports coming back from the guests that there were ticks in the rooms and bugs in the rooms that were biting." She looked in some of the rooms and discovered bedbugs. . . .
>
> Further incidents of guests being bitten by insects and demanding and receiving refunds led the manager to recommend to her superior in the company that the motel be closed while every room was sprayed, but this was refused. . . .
>
> . . . By July, the motel's management was acknowledging to EcoLab that there was a "major problem with bed bugs" and that all that was being done about it was "chasing them from room to room." . . . Rooms that the motel had placed on "Do not rent, bugs in room" status nevertheless were rented.
>
> It was in November that the plaintiffs checked into the motel. They were given Room 504, even though the motel had classified the room as "DO NOT RENT UNTIL TREATED," and it had not been treated. . . .
>
> Although bedbug bites are not as serious as the bites of some other insects, they are painful and unsightly. Motel 6 could not have rented any rooms at the prices it charged had it informed guests that the risk of being bitten by bedbugs was appreciable. . . .

**Exercise A:** Below is the court's explanation for its conclusion that Motel 6 is liable for an intentional tort. Is the court's explanation conclusory, substantiating, comprehensive, or cryptic? Did the court choose an appropriate level of explanation? (Should it have explained less, or more, or neither?) To answer these questions, you need to know why the court reached this conclusion. A plaintiff who has proved that a defendant has committed an intentional tort, such as fraud or battery, is eligible for punitive damages. In this appeal, the defendant raised two punitive damages issues. The first is this one (was the plaintiff eligible for punitive damages?). The second, which you'll reach in Exercise B, is whether the trial court's punitive damage award was too large.

> [Motel 6's] failure either to warn guests or to take effective measures to eliminate the bedbugs amounted to fraud and probably to battery as well (compare

*Campbell Iv. A.C. Equipment Services Corp*., 242 Ill. App. 3d 707, 610 N.E.2d 745, 748-49, 182 Ill. Dec. 876 (Ill. App. 1993); see Restatement (Second) of Torts, supra, § 18, comment c and e), as in the famous case of *Garratt v. Dailey*, 46 Wn.2d 197, 279 P.2d 1091, 1093-94 (1955), appeal after remand, 49 Wn.2d 499, 304 P.2d 681 (Wash. 1956), which held that the defendant would be guilty of battery if he knew with substantial certainty that when he moved a chair the plaintiff would try to sit down where the chair had been and would land on the floor instead. See also *Massachusetts v. Stratton*, 114 Mass. 303 (Mass. 1873). There was, in short, sufficient evidence of "willful and wanton conduct" within the meaning that the Illinois courts assign to the term to permit an award of punitive damages in this case.

**Exercise B:** Below is the court's explanation for its conclusion that the trial court did not award excessive punitive damages. Is the court's explanation conclusory, substantiating, comprehensive, or cryptic? Did the court choose an appropriate level of explanation? (Should it have explained less, or more, or neither?) Does the court rely on policy? Does it use counter-analyses?

. . . In arguing that $20,000 was the maximum amount of punitive damages that a jury could constitutionally have awarded each plaintiff, the defendant points to the U.S. Supreme Court's recent statement that "few awards [of punitive damages] exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003). The Court went on to suggest that "four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Id*. . . . Hence the defendant's proposed ceiling in this case of $20,000, four times the compensatory damages awarded to each plaintiff. The ratio of punitive to compensatory damages determined by the jury was, in contrast, 37.2 to 1.

The Supreme Court did not, however, lay down a 4-to-1 or single-digit-ratio rule — it said merely that "there is a presumption against an award that has a 145-to-1 ratio," . . . and it would be unreasonable to do so. We must consider why punitive damages are awarded and why the Court has decided that due process requires that such awards be limited. The second question is easier to answer than the first. The term "punitive damages" implies punishment, and a standard principle of penal theory is that "the punishment should fit the crime" in the sense of being proportional to the wrongfulness of the defendant's action, though the principle is modified when the probability of detection is very low (a familiar example is the heavy fines for littering) or the crime is potentially lucrative (as in the case of trafficking in illegal drugs). Hence, with these qualifications, which in fact will figure in our analysis of this case, punitive damages should be proportional to the wrongfulness of the defendant's actions. . . .

[O]ne function of punitive-damages awards is to relieve the pressures on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes. An example is deliberately spitting in a person's

face, a criminal assault but because minor readily deterrable by the levying of what amounts to a civil fine through a suit for damages for the tort of battery. Compensatory damages would not do the trick in such a case, and this for three reasons: because they are difficult to determine in the case of acts that inflict largely dignatory harms; because in the spitting case they would be too slight to give the victim an incentive to sue, and he might decide instead to respond with violence — and an age-old purpose of the law of torts is to provide a substitute for violent retaliation against wrongful injury — and because to limit the plaintiff to compensatory damages would enable the defendant to commit the offensive act with impunity provided that he was willing to pay, and again there would be a danger that his act would incite a breach of the peace by his victim.

When punitive damages are sought for billion-dollar oil spills and other huge economic injuries, the considerations that we have just canvassed fade. As the Court emphasized in *Campbell*, the fact that the plaintiffs in that case had been awarded very substantial compensatory damages — $1 million for a dispute over insurance coverage — greatly reduced the need for giving them a huge award of punitive damages ($145 million) as well in order to provide an effective remedy. Our case is closer to the spitting case. The defendant's behavior was outrageous but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional. And the defendant may well have profited from its misconduct because by concealing the infestation it was able to keep renting rooms. Refunds were frequent but may have cost less than the cost of closing the hotel for a thorough fumigation. The hotel's attempt to pass off the bedbugs as ticks, which some guests might ignorantly have thought less unhealthful, may have postponed the instituting of litigation to rectify the hotel's misconduct. The award of punitive damages in this case thus serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is "caught" only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away. . . .

All things considered, we cannot say that the award of punitive damages was excessive. . . . The judicial function is to police a range, not a point. . . .

# 13 Combining Proofs of Separate Conclusions of Law

## §13.1 Introduction

You may be writing a document that requires separate conclusions, either because you are addressing separate issues or because an issue has sub-issues that require individual conclusions. You can combine separately structured proofs for several conclusions or sub-conclusions into a single unified presentation.

You'll need to do this in four situations: where the rule includes multiple elements or factors (see §13.2); where more than one claim or defense is at issue (§13.3); where you have alternative ways of proving a single conclusion (§13.4); or where you're writing about separate but related issues (§13.5).

## §13.2 How to Organize Where The Rule Includes Multiple Elements or Factors

If you must resolve all the elements of a rule, you'll have an ultimate conclusion for the rule as a whole, together with a sub-conclusion for each element:

**Ultimate Conclusion on the Ultimate Issue**

"The client has a cause of action for negligence because Bevens injured the client by driving while talking on a hand-held cell phone."

Element #1: "As a driver, Bevens owed a duty of care to others on the road, including the client."

| | | |
|---|---|---|
| **Sub-Conclusions on Sub-Issues** | Element #2: | "Bevens breached that duty by talking on a hand-held cell phone while driving." |
| | Element #3: | "The client suffered injuries in an auto accident." |
| | Element #4: | "The accident and the injuries were proximately caused by Bevens's breach of the duty of care." |

An analysis of multiple elements for one rule begins with an opening or *umbrella* section that states the conclusion ("The client has a cause of action for negligence") and the essence of the reason ("because Bevens injured the client by driving while talking on a hand-held cell phone"). Next, the umbrella section introduces the *rule* on which the broad conclusion is based (the elements of negligence). If the rule is settled law, it might be proved in the opening paragraph with a citation to binding authority. Otherwise, *rule proof* would supply whatever else is needed to show what the rule is and that it applies to the situation. Finally, the umbrella section ends by briefly summarizing how the rule leads to the conclusion ("Here, the client can satisfy all four elements" or "While the client can easily show duty and breach, she may have a difficult time establishing that her injuries were caused by Beven's action").

The umbrella section could be a single paragraph in a simple situation and several paragraphs in a complicated one (for example, if the underlying rule is hard to prove). The umbrella is an incomplete paradigm structure because it *does not include rule explanation and application of the elements.* Instead, the umbrella sets up the large-scale structure of the analysis and provides the reader with a roadmap for what follows. Remember, legal readers like to know what to expect from what they are about to read. The umbrella section shows the reader what is coming and why. (For an example, see the Discussion in the office memo in Appendix C.)

Sometimes you will need to introduce the interaction between **a procedural rule and a substantive rule** as part of the umbrella. Substantive rules create rights and liabilities from events that occur in everyday life. You've been studying substantive rules in Contracts, Torts, Property, and Criminal Law. Procedural tests govern how lawyers work in litigation and how judges and juries make decisions. You're studying some procedural rules in Civil Procedure. In an analysis involving the interaction of substantive and procedural rules, the umbrella section should introduce both the substantive rule with its components and the procedural rule.

For example, in criminal cases, the defendant is guilty only if the prosecution proves each element of the crime beyond a reasonable doubt. The substantive rule defines the crime, including any sub-elements. The procedural rule (requiring proof beyond a reasonable doubt) is not part of this structure.

But, inside each issue, you use it to measure whether the substantive element has been satisfied. If the issue is whether the defendant is guilty of common law burglary, the sub-issues are, "Is there proof beyond a reasonable doubt that the defendant *broke* into a building?" and "Is there proof beyond a reasonable doubt that the defendant *entered* a building?" and "Is there proof beyond a reasonable doubt that the building was a *dwelling*?" and so on (see Chapter 4). The umbrella section would introduce both the common law burglary rule and the requirement of proof beyond a reasonable doubt rule, and the conclusions would incorporate both concepts.

Following the umbrella section should be separate discussions for each component of the rule (element, factor, sub-test, etc.). You can think of each component as a sub-issue for which you have a sub-conclusion (shown above), a rule, proved and illustrated with legal authority, and application to the facts. In other words, demonstrate your conclusion on each sub-issue through a paradigm structure, nested under the umbrella of the broad rule.

You will need to decide the order for the individual paradigm structures for each sub-part. This will depend on multiple factors, including the nature of the rule, your particular conclusions, and whether you are writing predictive or persuasive analysis. The logic of the rule might require addressing the elements in a particular order (for example, you can't discuss whether there was a breach of a duty without first concluding that a duty exists). In the negligence example above, if you were to determine that the client has no cause of action because talking on a hand-held cell phone did not proximately cause the accident, you could analyze the fourth element (proximate cause) before you analyze the others. The fourth element would be the most important one because it would resolve the ultimate issue — (whether the client has a cause of action).

In a persuasive document, if the parties agree that only one of the elements is at issue, you might indicate that in the umbrella and include only your argument on the dispositive element, or you might address the remaining elements in a more abbreviated paradigm structure. However, in a predictive document, you should address all of the elements. It might turn out that you're wrong about the element you believe to be dispositive. Your reader of a predictive memo will still want to know about duty, breach and injury in order to assess the strength of the case and decide on a course of action.

If you believe that *all* the elements can be proved, you should usually analyze them in the order in which they appear in the rule. That might be easier for the reader to follow if no element takes vastly more space than another to explain. But the situation might be different if one element were to consume, for example, three-quarters of the Discussion. There, the reader might be able to follow the analysis more easily if you were to dispose of the other elements first to set up the context.

Note that the umbrella structure repeats itself any time you have an analysis that involves sub-issues and multiple conclusions. So, for example, if the

court in your jurisdiction has developed a three-part test to decide when a defendant owes a duty of care, you would have an umbrella structure for the four elements of negligence, and then in the sub-section on duty, you would start with an umbrella to introduce the three-part test, followed by a paradigm structure for each part.

## §13.3 How to Organize Where More Than One Claim or Defense Is at Issue

Suppose your supervising attorney wants to know whether the client will be awarded damages in a tort case. You need to figure out whether the client has a cause of action (one issue or collection of issues). And you anticipate that the defendant will raise the affirmative defenses of comparative negligence (another issue or collection of issues) and sovereign immunity (yet another). Although this is a more complex situation than the one where you analyze several elements of a single issue, you handle it in the same way (see §13.2). You build an umbrella paradigm structure, and underneath the umbrella section you prove the sub-conclusions through separate, paradigm-structured analyses. For example, the ultimate conclusion might be that the client will be awarded damages because she has a cause of action (the first sub-conclusion); was not comparatively negligent (the second sub-conclusion); and the claim doesn't fall within the defendant's sovereign immunity (the third sub-conclusion). Thus:

| | | |
|---|---|---|
| **Ultimate Conclusion on the Ultimate Issue** | The client should be awarded damages. | |
| **Sub-Conclusions on Sub-Issues** | Sub-Issue #1: | The client has a cause of action for negligence (with separate proofs for each of the four elements). |
| | Sub-Issue #2: | She committed no comparative negligence (an affirmative defense). |
| | Sub-Issue #3: | Sovereign immunity does not prevent recovery here (another affirmative defense). |

## §13.4 How to Organize Alternative Ways of Proving a Single Conclusion

You may encounter a legal issue where the jurisdiction has no rule on point, where it could choose between or among competing rules, and where you could argue that either of two or more competing rules will — independently of one another — justify the conclusion. In law school, this is a common scenario in an appellate brief assignment. This scenario is also handled through the umbrella paradigm structure explained in §13.2:

| | | |
|---|---|---|
| **Ultimate Conclusion on the Ultimate Issue** | The judgment below should be reversed. | |
| **Sub-Conclusions on Sub-Issues** | Sub-Issue #1: | This court should adopt rule X. |
| | Sub-Issue #2: | Under rule X, the judgment should be reversed. |
| | Sub-Issue #3: | Even under rule Y (the competing rule), the judgment should be reversed. |

## §13.5 How to Organize When You're Writing About Separate but Related Issues

There are still other ways in which separate issues might need to be resolved to support a single conclusion. Suppose someone sues your client, and your supervising attorney wants to know whether that lawsuit can be dismissed on forum selection grounds (on grounds that it was brought in the wrong court). You'll have to resolve some or all of the following issues: Does this court have subject matter jurisdiction over this kind of case? Does this court have personal jurisdiction over our client? Is this court the right venue for this lawsuit?

If your conclusion is that the lawsuit was brought in the right court, you'll have to show that the court has subject matter and personal jurisdiction and that venue is proper. To do that, you'll use the same umbrella paradigm structure explained in §13.2:

| | | |
|---|---|---|
| **Ultimate Conclusion on the Ultimate Issue** | This lawsuit is not dismissible on forum selection grounds. | |
| **Sub-Conclusions on Sub-Issues** | Sub-Issue #1: | This court has subject matter jurisdiction. |
| | Sub-Issue #2: | This court has personal jurisdiction over our client. |
| | Sub-Issue #3: | Venue is proper in this court. |

## §13.6 How to Start Working with Multi-Issue Situations

All these different ways to organize probably seem overwhelming right now, but with some practice, they'll become second nature. The more experience you get with writing legal analysis, the more it will make sense to you. You will start to notice this structure when reading for your other classes. After some time, the paradigm structure for proving conclusions of law will become more comfortable for you. This section provides some suggestions for getting to that point.

*While researching and planning your writing, ask yourself how many issues you have.* If you have a hard time identifying issues, make a list of what conclusions it will take to show that the rule is satisfied. Then make a list of what conclusions it will take to find that the rule is not satisfied. Now consolidate those two lists to produce a list of issues. When you had two lists (before consolidating them), many issues will have been listed twice because they were flip sides of each other. When you consolidate, you'll often merge two issues into one. The advantage of making two lists is that it helps you avoid overlooking an issue. When you look at only one side of the case, you sometimes miss an issue that an opposing party might raise.

*Now, figure out what kind of issues you have.* Does the rule have sub-parts? Multiple elements? A multi-part test? Is an issue part of the cause of action, part of a defense, part of a procedural requirement, or something else? This will help you figure out which of the structures described in §§13.2 through 13.5 to use.

*Choose the relevant multi-issue structures explained in this chapter, and adapt it to your case.* Make a list of every conclusion of law you'll make in your memo or brief, like the lists in §§13.2 through 13.5. Organize the conclusions logically — for example, elements of a cause of action first, then defenses. Treat this as the beginning of an outline. In the next chapter, §14.1 explains how to complete this outline and turn it into a memo or brief.

*Start with an umbrella section to identify the broad structure of your analysis, introduce the rule, and provide a roadmap of your analysis*. In a simple analysis, the roadmap might be a sentence. In a long and complex analysis, the roadmap might be a long paragraph. In a longer roadmap paragraph, state your ultimate conclusion ("The client should be awarded damages," for example) and then state the sub-conclusions that support that ultimate conclusion in the order you address them in the sections that follow. If some elements of a test are at issue and others are not, the roadmap paragraph is the place to make that clear. Most judges say that a well-written roadmap paragraph is very important, or essential, in helping them understand what you are trying to say.[1] Here is a typical roadmap paragraph, which you might use to introduce the discussion outlined in §13.3:

> The plaintiff should be awarded damages. The evidence supports all four of the elements of negligence. The defendant owed a duty to the plaintiff to keep the loading dock clear and breached that duty by leaving explosive materials on the loading dock overnight. The plaintiff's injury, destruction of the warehouse, is uncontested. It was proximately caused by the breach when the materials exploded. Although the defendant pleaded the defense of comparative negligence, no evidence supports it. And sovereign immunity has been waived by § 419 of the Highways Code.

*Use headings to show your reader where your analysis of each issue begins.* Many legal readers won't read your work from beginning to end. They'll read parts of it at a time, and headings help them find the parts they need. If you're writing a predictive memo, look at the way headings are used in Appendix C. If you are writing a persuasive memo or a brief, you will write point headings, which are explained in Chapter 26.

1. Kristen K. Robbins-Tiscione, *The Inside Scoop: What Federal Judges Really Think about the Way Lawyers Write*, 8 J. Legal Writing Inst. 257, 273 (2002).

# 14 Working with the Paradigm

## §14.1 Using the Paradigm Structure to Outline and to Begin Your First Draft

Think of the paradigm formula for organizing proof of a conclusion of law (from Chapters 11, 12, and 13) as a tool to *help* you organize. It will also keep your material from getting out of control. Here it is again:

**To prove a conclusion of law:**

1. State your conclusion.
2. State the primary rule that supports the conclusion and prove that it is binding with citation to authority.
3. Explain and illustrate the rule through description of how the authority stands for the rule, discussion of subsidiary rules, examples of how the rule has applied to facts, analyses of policy, and counter-analyses.
4. Apply the rule to the facts using the terms and concepts identified in the explanation.
5. If steps 1 through 4 are complicated, sum up by restating your conclusion.

This section makes some suggestions for starting to work with the paradigm structure. There is no single-best approach. Some writers like to start by free-writing and then wrangling the written product into the paradigm structure. Others like to create a shell, or outline, and plug the components of the

paradigm into that existing structure. As you get more experience, you can experiment and figure out what method works best for you.

Begin by figuring out your large-scale structure as discussed in the previous chapter — how many issues and sub-issues you have, and how many separate paradigm structures. Then pull together your resources.

For each issue or sub-issue, gather the research related to that rule and identify your client facts that are relevant for figuring out if the rule is satisfied. Here's where it gets individual. You can create a spreadsheet, a chart, print out materials and put them in a folder, use an online organization system — whatever you think will work best to keep track of the materials and easily access them. Have a grouping for each separate issue, and if you have a statute, case, or fact source that is relevant for more than one of the issues, put it in each grouping.

Next, review each grouping and begin to identify how you might use each source. If you think you will use a source to set out and prove the rule, mark it with an "R." If the source will help you explain and illustrate the rule, mark with an E. Note whether any of the sources suggest a counter-analysis might be worthwhile. Your client facts should all be for application, and marked with an "A."

Now, think about how all these things add up. If you haven't yet drawn a conclusion, do it now. If you decided previously on a conclusion, check it against your raw materials to see whether it still seems like the best conclusion. Keep in mind that this initial assessment might change as you begin to write and work more specifically with your sources, but reaching this point should get you far enough to develop an outline and/or start writing.

Start the outline by creating a shell. If you need an umbrella structure, identify the conclusion and broad rule for the umbrella section. Then, for each individual conclusion, create a paradigm structure with headings for Conclusion, Rule, Explanation, Application and conclusion (the final conclusion does not need a separate section). Fill in the Conclusion section with a conclusion; the Rule section with the authority you will cite for the rule and notes about how you want to write the rule; the Explanation with the authority you will use to illustrate the rule and any notes about those sources; and the Application with the facts you plan to use.

While this structured outline approach works well for many writers, some people need to dive in and start writing to figure some of this out. With this approach, write out your thoughts and ideas about what you want to say, what your conclusion will be, how you will support it, etc. Then take that document and identify what you see. You can tag the sentences with C, R, E, etc., or you can color code the components of the paradigm with different color highlighting. Then take those components and move them so they follow the paradigm structure.

Your focus at this initial stage should be to gather all of your raw materials and organize them roughly in the paradigm structure. As you write and revise,

you will refine the structure. While you rewrite (Chapter 5), look to see where things are. If you find conclusions at the end of your analysis, for example, move them to the beginning. While rewriting, ask yourself the questions in §14.2 below.

## §14.2 Rewriting: How to Test Your Writing for Effective Organization

A legal reader can immediately recognize a well-organized presentation of analysis. The organization is clearly communicated with the use of headings, umbrella sections and transitions, so the reader knows what is coming next and why. Each issue is clearly resolved before the next is started. The legal concepts are clearly explained before rule application begins. The explanation is organized based on concepts, not individual sources of authority, types of authority, or the chronological order in which the law developed. The explanation includes neither too little nor too much detail. The application explicitly identifies how the facts satisfy the legal standard and why they support the conclusion. In other words, the reader can easily follow and understand the analysis and finish confident that the writer's conclusion is correct.

To figure out whether you have accomplished these things, ask yourself the following questions after you have written a first draft.[1]

**14-A** **Have you stated your *conclusion* for each issue? If so, where?** The conclusion should be the first sentence of the analysis. It should be clear and direct so the reader knows where you are going in the analysis. In predictive writing, the conclusion should indicate your degree of certainty: "Richardson will likely be liable to Jansen because Richardson engaged in dangerous driving." In persuasive writing, assert the conclusion without doubt: "Richardson is liable to Jansen for dangerous driving."

**14-B** **Have you stated the *rule* or rules on which your conclusion is based and cited authority? If so, where?** The rule should follow the conclusion. If the rule is from a statute, identify the specific statutory language. If the rule is from a case, quote or paraphrase the rule in a way that makes clear what its requirements are and cite the authority or authorities you used to identify those requirements. Do not just describe the case and make the reader figure out what the rule is.

1. When marking up your work, your teacher might refer to these questions by using the number-letter codes that appear next to each question here.

**14-C** **For each issue, have you *proved, illustrated and explained* the rule in an appropriate amount of depth?** Is your rule proof conclusory, substantiating, or comprehensive? Have you illustrated the terms of the rule with enough reasoning, factual illustration and policy so the reader can understand how to tell when the rule's requirements are satisfied? Have you identified counter-analysis that might resolve the case in a different way?

**14-D** **Have you completed rule explanation before starting rule application?** If you lose sight of the big picture, the result may be a little rule explanation, followed by a little application, followed by a little more explanation, followed by a little more application — and so on. Fully explain the rule before you start applying it. If you start to apply a rule before you have finished explaining it, your reader may be confused and have trouble understanding your analysis.

**14-E** **For each issue, have you *applied* the rule to the facts in an appropriate amount of depth?** Have you used the court's definitions and reasoning? Have you made specific comparisons between the facts in your rule explanation and your client's facts to show why they are similar or different?

**14-F** **Have you organized a multi-component issue so the reader understands how everything fits together?** If you have combined separately structured explanations, did you identify separate subconclusions? Are the combined paradigms covered by an umbrella section? Is the result crystal-clear to the reader? If not, how could it be made so?

**14-G** **Have you organized around tests and elements rather than around cases?** The cases and statutes are raw materials, and your job isn't complete until you have built them into a coherent discussion organized around the applicable tests and their elements. A description of one case after another isn't helpful to a decision-maker, who needs to understand how the cases work together to affect the facts. This is a common problem for new legal writers. If you have one paragraph after another, each of which is devoted to discussion of a single case, step back and think about the points you want to make, rather than the sources they come from. Make sure your discussion is organized around those points, using whichever source helps you to explain the point.

**14-H** **Have you avoided presenting authority in chronological order unless you have a special need to do so?** In academic writing, you might focus on the steps of how the law developed. In practice-based legal writing like memos and briefs, the reader wants to know what the current law

is, and how it governs the facts at hand. The history of a rule is only useful if it helps to explain what the law is now. Unless there's some special need to do otherwise, present authority in the order of its logical importance, not the order in which it came to be.

## Exercise
## Teddy Washburn's Gun

This exercise will give you practice with making a prediction and organizing raw materials — rules, facts, statutes, cases — into an outline that tracks the components of the paradigm. After the fact narrative below, you'll find two statutes and three cases, followed by questions for you to answer.

### Facts

In his prime, Gorilla Morrell was often on the bill at Friday Night Wrestling. Now he is reduced to hanging around Washburn's Weights Room & Gym, which is next door to Washburn's Bar & Grill. Gorilla is good for Teddy Washburn's business because customers in the Weights Room try to take Gorilla on. When this happens, customers from the Bar wander into the Weights Room to watch. There they order more drinks, which Washburn passes through a hole he has cut through the wall. Afterward, Gorilla, his adversary, and the spectators tend to adjourn back to the Bar, where the spirit of conviviality usually leads to games of billiards accompanied by further orders of food and drink.

Washburn has let Gorilla build up a bill of $283.62, dating back over several weeks. Last night, they had words over the matter. Gorilla took a swing at Washburn, who came out from behind the bar and chased Gorilla out into the street. There Gorilla took another swing at Washburn, and Washburn, demanding his money, pulled out a gun (which he bought and for which he has a license).

Gorilla grabbed for the gun, but it fell out of Washburn's hand, sliding five or six feet along the sidewalk and coming to rest at the feet of Snare Drum Bennett, a mechanic who was returning from work. Bennett happened onto this scene only in time to hear Washburn demand money and to see him pull out the gun and have it knocked from his hand.

Bennett, Washburn, and Gorilla looked at the gun, then at each other, and then at the gun again. Finally, Bennett crouched down, picked up the gun, checked to make sure the safety was on, and put it in her coat pocket. "Washburn," she said, "you haven't paid *me* yet for the front end work I did on your car."

"I will," said Washburn.

"It's $575," said Bennett, "and it's been three weeks. I think you should go back inside. You ought to pay your own debts before you accuse other people of welshing out on you."

"How can I pay you," exclaimed Washburn, "if he won't pay me?"

"That's your problem," said Bennett, "I'm holding onto the gun. You can't seem to handle it right now, and I want my money."

At that point, Gorilla clobbered Washburn in the face and sent him staggering. Bennett turned around, walked a half-dozen steps, and began to turn into a dark alley. Washburn started to get up, called out "Hey, you!" and took a step in Bennett's direction. Bennett took the gun from her coat, pointed it at Washburn, smiled, and said, "Back off, bucko."

Washburn froze, and Bennett walked into the alley. As soon as she was out of sight, she dropped the gun into an open but full trash dumpster. The dumpster belongs to a grocery store and is about five feet inside the alley, which in turn is about twenty feet from the front door of Washburn's bar.

An hour or so later, the police came to Bennett's home and arrested her for robbing Washburn of his gun. Bennett told them where she had dropped it. The police went straight to the dumpster but found nothing inside, not even the trash that had muffled the gun's fall.

## Statutes

*Criminal Code § 10:* No person shall be convicted of a crime except on evidence proving guilt beyond a reasonable doubt.

*Criminal Code § 302:* A person commits robbery by taking, with the intent to steal, the property of another, from the other's person or in the other's presence, and through violence or intimidation. A person does not commit robbery if the intent to steal was formed after the taking.

## Cases

### BUTTS v. STATE

The defendant had worked for the Royal Guano company for two and a half days when he was fired. He demanded his wages but was told that he would have to wait until Saturday, which was payday. He was ordered off the premises and left. After a few hours, he returned with a gun, found the shift foreman, and demanded his wages again. The foreman told him to come back on Saturday. (The company agrees that it owed the defendant wages, but insists that he wait until payday to receive them.) When the foreman refused, the defendant showed the gun and demanded again. The foreman then paid the amount the defendant requested.

An intent to steal is an intent to deprive the owner permanently of his property. There is no intent to steal if the defendant in good faith believes that the property taken is the defendant's own property and not the property of somebody else.

The defendant could reasonably have supposed that he was entitled to his pay when his connection with the company was severed. He was wrong because the money was the property of the company until the company paid it to him. But he acted in good faith and therefore did not have the intent to steal (although he may be guilty of crimes other than robbery).

## GREEN v. STATE

We reverse the defendant's conviction for robbing Mrs. Lillie Priddy.

Although there was evidence that the defendant assaulted Mrs. Priddy, that alone does not prove robbery. Mrs. Priddy testified as follows: She was walking along a road and came upon the defendant, who struck her so that she lost consciousness. After a minute or two, her mind cleared, and she saw the defendant standing in the road and her purse on the ground about five feet from each of them. The contents of the purse were spilled out on the ground. She kicked him and ran, never seeing her purse again.

The issue is whether there was a "taking" sufficient to support a charge of robbery. A taking is the securing dominion over or absolute control of the property. Absolute control must exist at some time, even if only for a moment.

If Mrs. Priddy was unconscious, she could not know whether the defendant ever had control of her purse, or whether it simply fell to the ground and was later taken away by someone else. None of its contents were found in the defendant's home. The testimony showed a very violent assault and battery upon her by the defendant, but does not establish a robbery.

## STATE v. SMITH & JORDAN

The defendants overpowered and disarmed the complainant of his knife. He had surprised them after they broke into his gas station. With the complainant's knife (but not the complainant), they got into their car and drove off. Later, the police found the defendants standing by their wrecked car. The complainant's knife was on the ground nearby. The defendants were convicted of robbery.

To convict for robbery, the defendant must have intended permanently to deprive the complainant of the taken property. If a defendant takes another's property for the taker's immediate and temporary use with no intent permanently to deprive the owner of his property, he is not guilty of robbery.

It would be unreasonable to assume that the defendants, fleeing from arrest for the crime of breaking into the gas station, had any expectation of returning the knife. They would have been captured if they had tried. For the purpose of decision here, we assume that defendant took the knife "for temporary use," and that after it had served the purpose of escape, they intended to abandon it at the first opportunity lest it lead to their detection. That, however, would leave the complainant's recovery of his knife to mere chance and thus constitute a reckless exposure to loss that is consistent with an intent permanently to deprive the owner of his property. In abandoning it, the defendants put it beyond their power to return the knife. When, in order to serve a temporary purpose of one's own, one takes property (1) with the specific intent wholly and permanently to deprive the owner of it, or (2) under circumstances which render it unlikely that the owner will ever recover his property and which disclose the taker's total indifference to his rights, one takes with the intent to steal.

## Analyzing and Organizing

**Exercise II-A:** You have been asked to determine whether Bennett is likely to be convicted of robbing Washburn of his gun. Make a list of the issues.

**Exercise II-B:** For each issue, make a separate document and, using the process described in §14.1, answer the following questions:

1. What rule from the cases above disposes of the issue? (If you can't find a rule that would dispose of the issue, say so. If that's true, it means that additional authority is needed.)
2. What passages from these authorities illustrate the rule?
3. What facts in Bennett's story would be determinative for the issue?
4. What passages from these authorities would guide you in applying the rule to those determinative facts? (If you find none for a given issue, say so. Again, if you're right, more authority is needed.)
5. What cases would you analogize to or need to distinguish? Why? How would you do it?

**Exercise II-C:** In Exercise II-B, you started creating an outline from which to write. If there are any holes in this outline, list them. How will you fill them in?

# COMMUNICATION OF PREDICTIVE ANALYSIS

# 15 Interviewing the Client

The starting point for predictive analysis is often an interview with a client or potential client. A person who wants a lawyer's help calls to make an appointment, saying "I've just been charged with a crime" or "I signed a contract to buy a house and now the owner won't sell." At the time of the appointment, that person and the lawyer sit down and talk. If the person has confidence in the lawyer, the visitor may become a client.

During that conversation, the lawyer learns what problem the prospective client wants solved, the client's goals in getting it solved, and what the client knows factually about the problem. The lawyer also learns about the client as a person, and gives the client a reciprocal opportunity to learn about the lawyer. Then or later, the lawyer and client also negotiate the contract through which the client hires the lawyer, but here we focus on the main parts of the interview: building a relationship with the client and fact-gathering.

## §15.1 Clients and Lawyers

Most clients are not really interested in hiring "a lawyer." They want to hire a genuine and caring human being who can solve their problem.

You probably dislike it when a doctor treats you as a case of flu, rather than as a person who has the flu. The problem is more than unpleasantness. A doctor who treats you as a human being with flu-like symptoms might spend enough time with you to learn that you also have other symptoms inconsistent with the flu, and that you have a different disease, which should be treated differently. If you have not yourself been a client, you can imagine what clients experience during lawyer interviews simply by remembering how you have experienced contact with professionals such as doctors.

Treating the client as a person is called "client-centered lawyering,"[1] which means focusing your efforts on what the client wants, rather than what you assume the client should want. Your client has hired you to accomplish the *client's* goal. And many clients can collaborate actively with you along the way, brainstorming with you how to solve problems.

You are obligated to keep secret whatever the client tells you in private, which is the lawyer's *duty of confidentiality*.[2] There are some limited exceptions, which you will learn about in your Professional Responsibility course.

## §15.2 The Interview

After the sort of pleasantries that people exchange when meeting each other, the lawyer says something like, "How can I help you?" or "Let's talk about what brings you here today" or "I understand the bank has threatened to foreclose on your mortgage. You're probably worried. Where shall we begin?"

### §15.2.1 Learning What the Client Knows

Keep an open mind about the client's potential claim until you have heard most of the facts. A client who starts by telling you about a dispute with a landlord might have defamation and assault claims rather than a breach of a lease obligation.

Do not leap in with questions as soon as the client has told you the nature of the problem. Give the client a full opportunity to tell you whatever the client wants to talk about before you intervene. A client may want to emphasize facts they feel strongly about, even if you think the facts aren't important. If you obstruct this, you will seem remote, even bureaucratic, to the client. And if you listen to what the client wants to tell you, you may learn important information that will help you give her the best legal advice.

In the beginning, encourage the client to present the facts in the way the client thinks best. After a while (sometimes pretty quickly), the client will want you to take the lead.

Most clients will not mind your taking notes, if you first explain that you want to be sure to remember everything the client tells you. But keep listening while you write and make eye contact often. Many clients will feel uncomfortable if you record the conversation, so it is better to take written notes, at least at first. Make sure you check to see whether your employer has any forms or policies regarding gathering information in initial client meetings.

1. David A. Binder, Paul Bergman, Susan C. Price & Paul R. Tremblay, *Lawyers as Counselors: A Client-Centered Approach* (2d ed. 2004).
2. ABA Model Rules of Professional Conduct, Rule 1.6.

### §15.2.2 Questions

Explore the various aspects of the problem in detail. On each topic, start with broad questions ("Tell me what happened the night the nuclear reactor melted down"), and gradually work your way toward narrow ones ("Just before you ran from the control panel, what number on that dial was the needle pointing to?"). But do this gradually. If you jump too quickly to the narrow questions, you will miss a lot of information, because the broad questions show you what to explore. Ask broad questions until you are not getting useful information anymore. Then go back and ask narrow questions about the facts the client did not cover. While the client is answering the broad questions, you can note the topics you will need to explore later using narrow questions.

When you start exploring various aspects of the problem in detail, try to take up each topic separately. Too much skipping around confuses you and the client.

Word your questions carefully. How you ask them has a lot to do with the quality and quantity of the information you get. A good question does not confuse, does not provoke resistance, and does not distort memory. *One of the marks of an effective lawyer is the ability to ask the right questions in the most productive way.*

What makes a question work well? First, it seeks information that really does need to be known. Second, a good question is phrased in a way most likely to produce valuable information. Some words help find information and encourage answers, while other words confuse, cloud memory, or provoke resistance. Third, a good question is asked in a useful sequence with other questions. Sometimes other questions have to be asked and answered first. And ask one question at a time. If you ask two at a time, only one of them will be answered.

Keep asking questions until you have all the details: when, where, who, how, and why. Get them precisely. "Last week" is not good enough. You need "Thursday, at about 11 AM, in the truckstop parking lot." If the client tells you about a conversation, ask who else was present, what else was discussed, how long the conversation lasted, how it started, how it ended, what words each participant used, and so on. You are going to need these details to analyze the situation. In nonprofessional life, vagueness and approximation are usually enough in conversations. But experienced lawyers know that, in representing clients, only precision works.

Before the interview ends, make sure you understand the timeline of events from beginning to end: What happened first, what happened next, what happened just after that, and so on.

### §15.2.3 Listening and Talking

The ability to listen well is as important in the practice of law as the ability to talk well. The popular image of a lawyer is of a person talking — to juries, to

judges, to adversaries, to reporters. But in the end, the lawyer who succeeds is the one who also knows how to listen. If you do not listen carefully, you might as well not have asked the question, and you will not know what to ask about next. Knowledge is strength, and in the practice of law one of the most important means of gaining knowledge is to listen carefully.

When communicating with clients, talk and write in plain English. If you have to use a term of art, explain its meaning in an uncondescending way. Use concrete, precise language and not vague generalities. Behave in ways that encourage clients to tell you things that you need to know and to ask questions about things that make the client anxious.

### §15.2.4 How to Conclude

Clients often want the lawyer to predict immediately whether the client will win or lose. Do not even try to make that prediction. You must first research the law. Your initial research might lead you to realize you need additional information or documents from the client. Nearly always, the client does not know all the facts, and you and the client will need to investigate them further. And you need to think about it. Hasty predictions are often inaccurate.

But clients want assurance. What can you give them? Usually, it is enough to explain what work you will do. A client might not realize that lawyers do not know all the answers right away. But we do know how to find the answers. You can convey to your client that you take the problem very seriously and want to do something about the issues. You can also explain specifically what you will do next.

As a client leaves your office, two questions are typically running through the client's mind: Will this lawyer be able to accomplish what I want? And did this lawyer truly *hear me* and *understand me*? The law and the facts might prevent you from accomplishing what the client wants. But nothing should prevent you from hearing the client deeply and understanding the client as a person.

# 16 Office Memoranda

## §16.1 Office Memorandum Format

Form follows function.

*— motto of the Bauhaus school of architecture*

An office memorandum predicts how the law will treat the client. Chapter 4, which you should review now, explains predictive analysis.

A memo typically addresses an issue for a particular client, but it may be read and used by other lawyers in the firm in the same or future cases. For example, a memo might be written after a client asks whether it would be worthwhile to start a lawsuit. If the answer is yes, and the client decides to sue, the memo might be used again to help a lawyer — perhaps you or your supervisor — draft the complaint. It might be used a third time when the lawyer responds to a motion to dismiss, and so on. And it might be used when a future client approaches the firm with a similar issue.

The predictive memo helps you and the reader understand how the law applies to the case, and what the answer to the question should be. That's because *writing is thinking.* When you start writing a memo, you might believe that the client has a cause of action. But as you try to explain why, you might discover that the explanation doesn't make sense and that the client actually has no cause of action. Writers often change their mind while writing because writing causes them to rethink what they thought they knew.

In law school, your assignments are usually hypothetical, but you should imagine that you're writing to the typical partner or supervising lawyer described in §6.2. This person will be busy and by nature skeptical and careful. She will be reading your memo for the purpose of making a decision and will

probably be under some kind of pressure (especially time pressure) while reading. And she will expect the memo to be organized in the format she is accustomed to.

Memo format varies from law office to law office and from case to case. When asked to write a memo in a work setting, it is always a good idea to ask for a sample so you can see the preferred format. A typical office memo includes some combination of the following:

1. A memorandum heading
2. The Issue Statement or Question Presented
3. A Brief Answer
4. The Facts
5. A Discussion
6. A Conclusion

In some offices and for some purposes, some sections might be combined or presented in a different order (for example, Facts first). In a relatively uncomplicated situation, the Brief Answer or the Conclusion might be omitted.

The rest of this chapter is easier to follow if you look to the memo in Appendix C for illustration as you read the description below of each of these components.

The **memorandum heading** simply identifies the writer, the recipient, the date on which the memo is completed, and the subject.

| | |
|---|---|
| To: | *[supervising lawyer]* |
| From: | *[you]* |
| Date: | *[today]* |
| Re: | *[subject, including client's name]* |

The subject line ("Re:" line) should include the client name (some firms might also require a case tracking number) and should specify enough context that the reader knows what issue(s) the memo addresses. For example:

| | |
|---|---|
| To: | Theresa Wycoff |
| From: | Christine Chopin |
| Date: | March 1, 2026 |
| Re: | Eli Goslin's Claim for a Constructive Trust |

The **Issue Statement or Question Presented** identifies the legal question(s) addressed in the memo. Where possible, the question should lead to a direct answer. The key components of an issue statement are:

1) the controlling body of law — statute or common law jurisdiction. If the issue is statutory, refer to the statute. If the issue is based on common law, refer

to the jurisdiction. The Issue for the memo in Appendix C refers to New York's common law.

2) the precise legal issue being addressed — this could be a statutory term or a common law doctrine. In the memo in Appendix C, the issue is whether the situation meets the common law requirements for a constructive trust.

3) the key facts that govern the answer — this should be just enough to give the reader the gist of the situation. This could be simply that the driver ran a red light, as with the Richardson hypothetical from Ch. 11. The Appendix C memo addresses a more complicated factual situation so includes more detail.

Here are some examples:

> Under Georgia law, is Richardson liable to Jansen for dangerous driving when he ran a red light at a busy intersection and caused an accident? [This question tells the legal reader that this is a civil common law claim for dangerous driving in the jurisdiction of Georgia and includes the key facts.]
>
> Under Georgia's reckless endangerment statute, has Richardson committed felony reckless endangerment by running a red light at a busy intersection and causing an accident? [This question tells the reader that this is a criminal prosecution under the reckless endangerment statute and includes the key facts.]

The **Brief Answer** is a concise summary of the Discussion section in which you state your prediction and the reasoning that supports it. This usually involves identifying the rule and key facts, together with some indication of how the facts and rules come together to cause the predicted result.

Your prediction should be based on your analysis of the law and fact. Carefully choose the words that will tell the reader how much confidence to ascribe to your predictions. Do *not* say "maybe"; this abdicates your responsibility to form a professional opinion (what the client is paying you for). You can use words like "probably," "probably not," "likely," or "unlikely." A simple "yes" or "no" will be understood as the equivalent of "almost certainly yes" or "almost certainly no," and you do not need to add the extra words. If the prediction depends on facts you don't know, make that clear — for example, *"Richardson will be liable for dangerous driving if he was driving over the speed limit when he ran the red light."*

For the reader in a hurry, the Brief Answer should set out the bottom-line response in the most accessible way. Compare two Brief Answers, both of which respond to the following Issue:

**Issue**

> Did the District Attorney violate the Rules of Professional Conduct by announcing an indictment at a press conference where the defendant's

criminal record was disclosed, a tape-recorded confession was played, ballistics test results were described, and the defendant was presented for photographs without her lawyer's knowledge?

**Brief Answer**
**(Example 1)**

Under Rule 3.6 of the Rules of Professional Conduct, it is unethical for a prosecutor before trial to publicize, among other things, any criminal record the defendant might have, any confession she might allegedly have made, or the results of any tests the government might have undertaken. Under Rule 8.4(d), it is also unethical to engage in conduct "prejudicial to the administration of justice." That has occurred here if the press conference — and particularly the presentation of the defendant for photographers — created so much pretrial publicity that the jury pool has been prejudiced. Therefore, the District Attorney violated Rule 3.6 and may have violated Rule 8.4(d).

**Brief Answer**
**(Example 2)**

Yes. The District Attorney likely violated Rule 3.6 of the Rules of Professional Conduct by publicizing the defendant's criminal record, an alleged confession, and the results of ballistics testing before trial. In addition, the prosecutor may have violated Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice, if public display of the defendant for photographers generated pretrial publicity sufficient to prejudice the jury pool.

Example 1 is closer to the way you might think through the Brief Answer in a first draft. But to make it useful to the reader you would rewrite it to be something like Example 2, which can be more quickly read and understood.

The **Facts** set out the events and circumstances on which the prediction is based. Usually, the Facts tell the story in narrative form, but sometimes organizing them by topic works better — for example, if different things happened in different places at the same time. Include dates only if they affect the outcome or are needed to avoid confusion.

One way to begin the fact statement is to introduce people, as in the Appendix C memo. Another is to summarize the most important event or events (*"Mr. Goslin deeded his home to his nephew, assuming he would be able to continue living there, and now the nephew is trying to force him to leave"*). A third way is to state why the memo is being written (*"Mr. Goslin wants to know whether he can regain ownership, or at least exclusive possession, of his home"*). Choose the method that would be most helpful in the case at hand to the reader who will probably make the most use of the memo.

Include all facts you use in the Discussion when you apply the law to the facts, along with any explanatory facts needed to help the story make sense. If your reader is already familiar with the factual background, this part of the memo might be quite short — much shorter than the fact statement in Appendix C — because your purpose will be to remind the reader about the essential facts, rather than to make a detailed record of them.

For example, if you and your supervisor have recently spent time working together on the Appendix C case — and you know your supervisor is already familiar with the facts — you might use a condensed fact statement like this:

> Our client Eli Goslin is elderly, retired, arthritic, and a widower. His only asset is his home, and he has no other place to live. His only income is from social security.
>
> Last year, when Goslin could no longer pay his mortgage, his nephew, Herbert Skeffington offered to make the remaining $11,500 in payments as they became due. Seventeen years ago, the client contributed $3,200 to Skeffinton's college tuition, but he did not say he was now reciprocating.
>
> Goslin, without stating his purpose to anyone, then gave a deed to the house to his nephew. The client has told us, "At the time, it seemed like the right thing to do. He was going to pay the mortgage, and after a certain point — maybe after I'm gone — the place would become his. I didn't think it would end up like this." Skeffington did not ask for a deed.
>
> A few weeks ago, Skeffington unexpectedly moved into the house and ordered our client to move out. Goslin refused, and his nephew has become verbally and physically abusive.

Compare this condensed version with the one in the Appendix C memo, where the writer knows that the reader is less familiar with the factual details.

The **Discussion** is the largest and most complex part of the memo. It proves the conclusion set out in the Brief Answer. When writing a Discussion, you will use rules to predict what a court will do; organize proof of your conclusion; select authority to back up your conclusion; and work with precedent, statutes, and facts according to the concepts in Chapters 11-14.

The **Conclusion** summarizes the discussion in a bit more detail than the Brief Answer does. If you are thinking this seems repetitive, it is, and many lawyers do not want to see a lengthy conclusion, or may read either the Brief Answer or Conclusion, but not both. Check to see if your reader really wants this section. A Conclusion section is most useful in very long memos, or if you want to identify ways to solve the client's problem, or evaluate options already under consideration.

## §16.2 Writing an Office Memo

There is no one right approach to writing a memo. Some lawyers prefer to write the Discussion before writing anything else because the other components of the memo will be shaped in part by insights gained while putting the

Discussion together. Other lawyers start by writing the Facts because that is often an easy way to get started, and they can be modified during rewriting after the Discussion is written. Other lawyers are flexible. They start with whatever component begins to "jell" first, and they often draft two or more components simultaneously. Review Chapter 5 for more tips on writing.

## §16.3 How to Test Your Writing for Predictiveness

After you have written a first draft — and before you start on later drafts — ask yourself the following questions.

**16-A** **Have you edited out waffling?** It is fine to qualify your conclusion with a "probably" or "likely," but you should make a clear prediction. Vague waffling, using words like "seems to," "appears," and their synonyms, makes your advice less useful to clients and supervising lawyers. Don't worry about being wrong. If it happens that your reader disagrees with you, lightning will not strike you down on the spot. Instead, your supervisor will recognize that you have done your job: given her enough information to make an informed decision, even if that decision is contrary to your analysis.

**16-B** **Have you said or implied whether your prediction is qualified?** If you have qualified your prediction, you should make clear why. Is the law unsettled because courts disagree with each other, or because a statute is so new that it hasn't yet been interpreted by courts? Does it depend on which facts can be proven? If so, make sure the reader understands that. Make a precise statement of the variables on which the prediction is based (e.g., "*If our client can provide evidence . . .*" or "*The defendant will probably prevail unless . . .*").

**16-C** **Have you accounted for gaps in the law?** Sometimes the law has gaps — holes that have not yet been filled in by legislation or by precedent (see §7.5 in Chapter 7). If the law you're dealing with is unsettled or incomplete, have you identified the gaps for the reader? And have you predicted how the courts will fill them?

**16-D** **Have you solved a problem rather than written a college essay?** A college essay is a forum for academic analysis — analysis to satisfy curiosity — rather than for practical problem-solving. In a college essay, you can reason in any logical manner toward any sensible goal you select, even at whim. But legal writing is practical work. Your Discussion should focus on resolving specific questions. Sentences not helpful in resolving those questions should be cut.

# 17 Email Communication

Lawyers write a lot of email. They write to coworkers, clients, opposing counsel, courts, and many others. They send email to set up meetings, ask and answer questions, attach documents, communicate legal analysis, and for other reasons. A lawyer with a busy practice sends and receives a high volume of email every day.

As a new lawyer, your goal should be to ensure that you use email professionally and effectively. Although you may have been writing email nearly all your life, you may not have done so in a professional context.

Some lawyers use AI models to help with tasks such as writing email, and this chapter will point out when generative AI might be helpful. When using AI in a professional context, always check to see whether your employer allows or prohibits it (in general or in terms of specific platforms), be mindful of rules around client confidentiality, and always verify that the content produced is accurate and all sources are valid. And please keep in mind that because of AI's rapid evolution, some of this advice may be outdated by the time the book hits the shelves.

Writing professional email is a skill. This chapter explains how to ensure that your email has the proper form, tone, appearance, and content.

## §17.1 Professional Tone and Appearance

When writing email in a law practice context, your primary goal should be to meet the needs of your reader (as in all legal writing). You can accomplish this by being mindful of both maintaining a professional tone and making your writing easy to read on a screen. Although you may not have previously thought about these issues when writing email, as a lawyer, they should become second

nature to you. As you read through this section, refer to Appendix D, which provides an example of a professional email.

### §17.1.1 Keeping It Professional

Being professional in email does not mean being stiff and overly formal. Email tends to be more informal than memoranda of law (Chapter 16) and letters (Chapter 19). In an email, it is acceptable to be conversational, as long as you remember that this is a professional communication and not a quick note to a friend. Each component of the email should be clear, direct, and focused, without extraneous information. When you start a new job, ask to see a sample or two of email that would illustrate that office's expectations concerning form and tone.

**Subject line.** Assume that your reader is busy, with an inbox full of messages. The subject line should clearly communicate the purpose of the email so the recipient doesn't overlook it. If the email refers to a client or a case, include the name but also the email's specific subject. For example, "A v. B" provides much less information than "A v. B., custody hearing." If you are replying to a message, don't change the subject line unless the topic of the message has shifted to something different. Think about how your reader might search for the message and use language that is distinct and easy to find.

**Heading.** You might consider labeling your email as either "Privileged and Confidential: Attorney-Client Communication" (if it is a communication with a client) or "Privileged and Confidential: Attorney Work Product" (if the communication contains your strategies, legal opinion, theories or conclusions). You will learn more about this in your Professional Responsibility course but err on the side of caution.

**Salutation.** In most cases, begin the email with a salutation. If the email is part of a back-and-forth exchange, use your judgment about whether a salutation is necessary every time. Starting with a greeting helps you to maintain a professional approach to the email. How you begin depends on the relationship you have with your reader and the environment in which you are writing. In a very formal law firm, you might be expected to start an email to a partner with "Dear Ms. Khan," whereas in a more casual environment you might write "Hi, Sofia." First names may or may not be appropriate, depending on how well you know the person to whom you are writing and the nature of the relationship.

**Body of the message.** The content of the message obviously depends on its purpose. Regardless of the content, however, the principles of good legal writing apply. You don't need to be overly formal in your use of language, but your writing should be clear, concise, and direct. Decide on an appropriate level of detail and omit anything extra.

Get to the point quickly. Although a greeting is helpful, spending too much time on pleasantries may irritate a busy reader. In addition, keep the email focused on one subject. Don't mix personal business, such as making plans for lunch, with answering a legal question.

**Signature.** Signatures are expected in professional communications. They reinforce that you are attaching your name to your message and stand behind what you have said. In addition, you should have an automatic signature block that makes it easy for your reader to get in touch with you for follow-up questions.

### §17.1.2 Writing the Email

You'll find it easier to do the writing in a separate document and then paste your work into the email, especially for longer emails. Writing in a separate document ensures you won't send the email before you have had time to reflect and edit.

If you have included formatting such as headings or bullet points, be sure the formatting is accurate before hitting *Send*, especially if you have copied and pasted from another document. Read your work one last time to be sure the headings are where you want them and, if you numbered paragraphs, that the numbers survived the journey from copying to pasting.

The *last* thing to do before sending is typing the recipient's name in the *To* field. If you do that earlier, and you accidentally hit *Send* before finishing the message or adding any attachments, the recipient will receive an unfinished message. Although you'll realize your mistake and send a corrected message soon after, the recipient will have an overloaded inbox, will probably confuse the two messages, and will be puzzled about what you're communicating — to your embarrassment.

### §17.1.3 Making the Email Easy to Read

In addition to adopting a professional tone, your email should be professional in appearance and easy for your reader to follow. It is as likely that your email will be viewed on a mobile device, such as a phone or tablet, as on the larger screen of a laptop or desktop computer. It's difficult to read large blocks of text on a small screen. What looks like a few lines on a laptop screen may make for a lot of scrolling on a phone. One good way to get a sense of how easy your email is to read would be to send it to yourself and view it on different devices.

How do you deal with the problem of endless scrolling when you have to write a legal analysis of a complex question? You can use several techniques. First, write as concisely as possible, and do not include extraneous information. Second, break the text up into smaller units, using headings, subheadings, and bullet points to make it easier for the reader to follow your organization

and not get lost. You can also use different systems of headings, numbering, and bullets to indicate the hierarchy of information in an email, and to communicate the relationship among concepts.

Be aware of font and typeface. You might not have control over how your email is viewed. Thus, use with caution techniques such as varying the font type, size, and color. Changing font color could also be perceived as unprofessional, and some colors may be hard to read. Steer away from these methods of differentiating text unless you are very confident that you know how your email will be viewed.

## §17.2 Email and Confidentiality Problems

A lawyer's work is governed by a number of ethics rules, which you will learn in detail in your course in Professional Responsibility. One of a lawyer's ethical duties is to keep confidential everything the lawyer knows about the client and the client's situation, unless the client authorizes the lawyer to reveal those confidences. (There are other exceptions, but they aren't relevant here.)

Nearly all states have adopted the ABA Model Rules of Professional Conduct. Here are excerpts from the rule on confidentiality:

### Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

*[Paragraph (b) lists various exceptions to the duty.]*

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Official Comments 5 and 19 relate to email even though they don't mention email:

### Comment 5

. . . Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

### Comment 19

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable

precautions to prevent the information from coming into the hands of unintended recipients.

Much of your email will include confidential information. Much of it will contain attorney work product, which is covered in the discovery part of your course on Civil Procedure. And much of it can affect the attorney-client privilege, which you will learn about in your course on Evidence.

You can cause a lot of damage if your email ends up on the wrong person's computer screen. You might breach your ethical duty of confidentiality; create work product and discovery issues; inadvertently waive your client's attorney-client privilege; or do two or even all three of these. Be sure to carefully address your email to the correct recipient; and be careful if your email system autocompletes or autofills addresses. Pay careful attention to your email's *To* field or your email could be delivered to the wrong person. Also, be sure you haven't inadvertently chosen the *Reply All* option when you mean to reply to the sender alone and not to the people whom the sender cc'd. If you have attached a document, double-check to be sure it's the one you intend to send.

If you accidentally send an email or an attachment with confidential information to someone who shouldn't see it, you are required to notify your superiors and, in some instances, your client. You are also required to do your best to mitigate any damage that is caused. Although it might be unpleasant or embarrassing, you should address the issue as soon as possible.

Many lawyers and law firms include boilerplate language at the end of every email, stating that the email's contents are confidential. But that wording is not sufficient to protect the email's confidentiality. If the wrong person has seen an email, the boilerplate language can't erase information from that person's memory.

## §17.3 Email Pitfalls

Used properly, email enhances law practice by facilitating quick and easy communication. But if not used carefully, email can embarrass you and, worse, adversely affect clients and other lawyers. When preparing to write an email, start by asking yourself whether an email is appropriate. Is this a matter better handled with a phone conversation? Is what you are going to say too complicated for the short email format? Do you really need to contact your recipient at all, or is it an issue you can resolve yourself?

Lawyers are critical readers with high standards. Experienced lawyers often complain that recent law school graduates are too informal in their use of email, showing a lack of professionalism. Don't assume that you can use sloppy or wordy language just because you are sending an informal email. To avoid embarrassment, spell everything perfectly and use proper grammar. Write

complete sentences, not fragments. Avoid slang. Address your reader with respect. Although email is more informal than other types of legal writing, it is still a professional communication and requires a professional tone. This is a place AI models could help by taking your existing draft, correcting errors and making it more concise (make sure to verify that the AI output has not changed your meaning). Assume that every email you write might later appear as an exhibit in a lawsuit and be read by a judge and jury. Write your emails so carefully and professionally that you wouldn't be embarrassed if that were to happen.

Experienced lawyers complain about the frequency and timeliness of emails written by new lawyers. Because email transmits immediately, other lawyers and your clients will expect prompt replies. Try to respond to every email within 24 hours, even if just to acknowledge the message and say you are working on the answer. Don't send hasty or thoughtless messages. Busy lawyers are flooded with email and don't want to see any more than is necessary. Because email is easy to send, junior lawyers tend to send frequent and multiple emails to supervisors. Stop and think before sending. Have you gathered all of your questions and comments into a single message, rather than sending multiple messages? Have you paused and reflected rather than sent an email in haste or anger? These are common mistakes to avoid.

Email can easily lead to misunderstandings because it can be difficult to interpret tone in writing. Words you intend to be friendly can often look unfriendly. To prevent misunderstanding, sometimes you'll need to express in words the things that in conversation you would communicate by voice tone. For example, if in an email you mean to ask a favor, instead of this:

> My client needs the contract signed by Thursday. Will you be able to do it by then?

You might want to write something like this:

> My client needs the contract signed by Thursday. I realize that this might be a problem for you and your client. But is there any way you can do it by then?

You can use an AI model to alter tone by inputting your existing text and asking for it to be more polite, more aggressive, etc., depending on your goal.

## §17.4 Communicating Legal Analysis in an Email Memo

Often you'll be asked to answer a legal question and to deliver your answer and reasoning in an email. You will write an *email memo* — an email that functions somewhat like an office memorandum, but scaled down drastically to

email proportions. The chief differences between an email memo and a formal, full-scale memorandum are that (1) no standard format exists for communicating legal analysis in email and (2) the analysis will likely be simple and straightforward. Email usually isn't the appropriate vehicle for long and complex legal analysis.

Writing a "memo-like email" is challenging because you must compress sophisticated legal analysis into the body of an email. And it's challenging because you must do everything quickly. Your supervisor asked for an email because she needs your answer fast.

Once you have determined that you fully understand the legal question or questions you are addressing and have all of the relevant facts, go about the analysis in much the same way you would if you were writing a formal full-scale memorandum of law.

**Organization.** Although an email has a much less formal structure than a memorandum of law and doesn't typically have separate sections for issues presented, brief answer, statement of facts, etc., you should still analyze your issue and organize your response using the paradigm outlined in Chapter 11. Although the level of depth may vary in an email, the basic principles of stating your conclusion, explaining and citing your legal authority, and applying that authority to the facts are important in any kind of legal analysis.

You don't need a formal issue statement or question presented, but you should start the email with a quick review of the issue you are addressing together with your bottom-line answer. This quick overview will help to focus the email and let your reader know what to expect.

To figure out how much detail to include in the paradigm rule explanation and application (Chapter 11), first go through all the analytical steps yourself to ensure you fully understand the issues. Then make decisions about what to highlight and how much to include for your reader (see Chapter 12). If an issue is clear and not complicated, you can be more conclusory. If an issue is complex and confusing, provide more depth. You might decide to simplify the rule explanation by providing less detail about a judicial opinion. Consider using parenthetical explanations with case citations as a means of efficiently explaining precedent. Or you might present a more conclusory application of law to fact, highlighting the outcome more than the reasoning. You can't make those decisions until you have fully thought out the analysis for yourself, however, and determined how much will be lost if you cut down on the detailed explanation. If you decide the analysis is too long and complex to be easily read in an email, you might make the choice to write a longer document and attach it to the email, providing your reader with just a summary in the email itself.

You don't need to end the email with a reiteration of your conclusion. In an email, this should be obvious and unnecessary. If your analysis has revealed further questions to explore or next steps that should be taken, identify them

and ask your supervisor whether you should proceed. Otherwise, just wrap up and sign off.

**Citation to legal authority.** Remember that you are writing to a legal reader, who will want to know how you supported your analysis, even in an email. That means providing your reader with easy access to the legal authority upon which you relied. This is particularly important if you have presented the highlights of a case holding without an in-depth discussion of the reasoning. It is good practice, if you are writing to a supervisor, to ask before writing the email about her preferences regarding how to provide authority. Some lawyers might be satisfied with a citation they can look up. Others might want hyperlinks, although if you use this option, be sure you are clear on what source to link—a commercial service or a free website. Another good option, which many lawyers prefer, is attaching PDF files of the cases and other authorities on which you have relied. Your goal should be to provide your busy reader with the easiest and most efficient way to check on the authority on which you have relied.

## §17.5 How to Test Your Emails for Professional Effectiveness

Before hitting *Send*, ask yourself the following questions:[1]

**17-A** Is your email addressed to the right person? Have you checked to make sure you haven't hit reply-all or that your email system hasn't autofilled the wrong address?

**17-B** Is the subject line clear, so the reader can easily identify your email's purpose?

**17-C** Have you included an appropriate greeting and signature?

**17-D** Is the email clear and concise, with a professional but not overly formal tone, so that a busy reader can quickly and easily read through it?

1. When marking up your work, your teacher might refer to these questions by using the number-letter codes that appear next to each question here.

**17-E** Have you used headings, bullet points, and other devices to make the organization easy to see and to keep the email readable on small screens?

**17-F** Have you clearly organized the legal analysis in enough depth for the reader to feel confident in your analysis without being overwhelmed?

**17-G** Have you asked for information or identified next steps, where appropriate?

**17-H** Have you included attachments or links, or otherwise provided access to the information upon which you relied to develop your answer?

**17-I** Have you proofread for errors and clarity?

# 18 Oral Presentations to Your Supervising Lawyer

For lawyers, time is quite literally money. In addition to busy law work, a lawyer must cultivate clients, and those clients are cost-conscious. For these reasons, as well as for convenience and the advantages of personal interaction, the modern practice of law increasingly requires junior lawyers to report their research results orally. For many issues, a full, formal memorandum would not be efficient or necessary. And an oral presentation gives the supervising lawyer an opportunity to discuss the issue with the junior lawyer and ask questions so that both lawyers, talking together, can test ideas and brainstorm.

The junior lawyer may meet with the senior lawyer in person, or by phone or videoconference. Whatever the format, the junior lawyer should prepare carefully and treat the virtual meeting as professionally as she would an in-person meeting. The first important part of the meeting is the initial summary. The junior lawyer's initial summary should be as brief as possible given the complexity of the legal problem. The summary should get *immediately* to the most important point. You might start by saying something along the lines of "you asked this question; the answer is this; here is why."

This chapter lays out the best practices for giving an oral presentation of research. In sum: (1) Prepare a short overall presentation of the conclusion and analysis, akin to the brief answer in the memorandum or the short email answer; and (2) prepare to answer key questions about the analysis and authorities, as well as the path of your research.

# §18.1 Preparing

## §18.1.1 Getting the Assignment

As a preliminary matter, be sure you and your supervisor are on the same page in terms of what she wants you to do. With any assignment, show up with something that allows you to take notes. This can be paper or electronic; just be sure it is something that allows you to write quickly. The important thing is that you write down the issue or assignment as explained by the supervisor, and then before leaving, read it back to your supervisor. You can say something like, "I just want to be certain that I'm supposed to research whether our client has a reasonable expectation of privacy while he's in his business office." Be sure you understand which jurisdiction's law governs. And ask approximately how much time you should spend on the assignment. Time is a budgeted resource.

## §18.1.2 Researching

While doing your research, keep your focus on the precise question so you don't waste your time (and anyone's money) digging up law that will ultimately not be relevant. A useful technique is to have a research "bull's-eye" or target that you keep written down, near you while you research, so that you can periodically remind yourself. Start with a narrow target and move away from it in small steps only to the extent you determine that there is no law on the initial target. Especially with online research, which allows you to follow link after link, it is too easy to lose your way and go far from your original target.

Secondary sources are a useful place to start your research for many reasons. They can give you a comprehensive "big picture" understanding of the issue, and that will help in all phases of the presentation: making a conclusion, analyzing difficult law, and answering questions from your supervisor.

## §18.1.3 Writing Out Your Analysis

Before the meeting you should read and synthesize the law. Organize this synthesis, as you would any legal analysis, using the paradigm (Chapter 11) and a level of depth appropriate to the situation (Chapter 12). Begin with your conclusion, briefly summarize the key law or rules on which you rely, note your key authority, and then apply the law to your client's facts.

Prepare for the oral presentation by drafting something in writing. This is the best way to prepare to speak cogently and effectively. It will help you organize your thoughts and work out any problem areas ahead of time. You do not want to go into the presentation without a fully formed idea of your answer and your reasoning. Approach the presentation just as you would the discussion of authority in a formal memorandum, without the added step of having to polish your writing.

Writing your analysis in advance will prevent you from floundering about or rambling during the meeting — both of which are real dangers with this type of report and are irritating to a busy senior lawyer. You might also find that your analysis changes or evolves as you write. It's best for this kind of evolution to happen *before* the meeting with your supervisor, rather than in front of her. It's dangerous to go into a meeting with a stack of cases and no idea what to make of all of them. It's like bringing a bag of puzzle pieces to your boss and asking her to assemble the puzzle. That's not her job. It's *your* job.

### §18.1.4 Whittling Down the Analysis to the Initial Summary

When you have reached a conclusion and analysis in which you are fairly confident, then you can start whittling your analysis down to its essentials. The essentials will be your initial summary. Two good starting points for organizing and compiling the initial summary are the "brief answer" for an office memo (Chapter 16) or an email answer (Chapter 17). As always, you should start with your conclusion, summarize the relevant rules on which you rely, and apply it to the client's facts. But the "rule explanation" part will be quite abbreviated, expanding or contracting as necessary depending on the complexity of the issue. Think of describing your authority in terms of quick explanatory parentheticals as opposed to paragraph-long descriptions. Again, the key here is to be as direct and brief as possible given the nature of the issue. Your initial summary is really an entrée into the real purpose of the meeting, which is the discussion led by questions from your supervisor.

## §18.2 Questions from Your Supervisor During the Meeting

After you finish stating your summary, you should expect questions from your supervisor. Lawyers are skeptical and probing by training. They are excellent at finding weaknesses and holes in a legal analysis. One lawyer we know says that the toughest oral argument she ever did wasn't in any courtroom — it was in the office of a senior partner at her law firm. The questions may be tough, but try to look at them as an important step in the collaborative brainstorming process. You are both on the same side and are trying to do the best work for the client.

Because you will likely get questions, particularly about your legal authority, it is very important that you go into the presentation with materials that will help you answer the questions quickly and accurately. First, have clear, easy-to-follow notes about your research path. This is especially important if you have little or no "on point" authority and if your reasoning is built on analogies

and other statute and precedent analysis tools (Chapters 8 and 9). Your supervisor will want to ensure that you checked all potential avenues for authority. You should be able to explain your research path in a coherent, organized way. Be prepared to discuss not only where you looked, but what searches you used and what results they achieved. If you chose not to look at certain authorities, be prepared to say why.

Second, be prepared to discuss the substance of the authority. It's a good idea to have copies of the key cases with important language highlighted (either electronic or hard copy). You may want to ask your supervisor ahead of time whether she wants the key authority sent to her in advance by email or instead provided at the meeting in hard copy (or both). If you provide hard copy, highlight and annotate the essential parts to make it easier for her to find the key language when you refer to it.

But you will need more than copies of the cases. No one expects you to have memorized the case law, but you don't want to be flipping through stacks of cases searching for the answer. This is anxiety-producing, embarrassing, and inefficient. Instead, find a way to organize a "cheat sheet" of your cases that you can refer to quickly and easily. One way is a case chart or matrix. This can be done in a Word table or in Excel or another charting program. The left column is your list of cases and other columns are for key facts, holdings, and relevant reasoning. Try to keep this chart to one page, or perhaps two in very complicated cases. A simple one looks something like this:

| Case | Facts | Holding | Reasoning |
|---|---|---|---|
| *State v. Brown*, 660 A.2d 1221 (N.J. Super. App. Div. 1995) | Police found evidence of a murder in defendant's duffel bag hidden in storage room in basement of apartment building. Other tenants of the building and super had keys to room. | 4th Amendment did not bar search. | Defendant had no reasonable expectation of privacy in duffel bag stored in storage room to which others had keys. |
| *People v. Duvall*, 428 N.W.2d 746 (Mich. App. 1988). | Police searched desk of sheriff's deputy and found evidence of a crime. Sheriff's deputy shared desk with others. | Sheriff's deputy had no standing to object to search. | Defendant had no reasonable expectation of privacy in desk others shared. |

## §18.3 Typical Questions

A supervisor's questions will vary with the legal issue, of course. Try to anticipate questions ahead of time and prepare answers to them. Look for holes or weaknesses in your analysis and identify the reasons why they don't change your conclusion. Distinguish or otherwise address adverse law or facts. Here are some typical questions supervising lawyers may ask:

- What is our best authority? Why is it the best? Is it mandatory or nonmandatory? If nonmandatory, why do you think the court in our case will follow it? Are there any distinguishing facts that the other side could use to diminish the value of the case? What are they, and how would we handle that argument?
- What authority hurts us the most? Why is it the worst? Why doesn't it change your conclusion? How can we handle it?

You might not be able to answer every question definitively, but that's okay. Again, you and your supervisor are on the same side, and this is a discussion. Be forthright about weaknesses in the client's position. Don't sugarcoat weakness or try to hide it. If your conclusion is that the client probably won't prevail, be clear about that.

If you cannot answer a question, be honest about that, too. You can always offer to do additional research to look into a question that arises. One way to prepare to handle tough questions is to look at secondary sources like treatises or practitioner manuals. Secondary sources can often be the first step in a research project anyway. In an oral presentation, secondary sources can be very helpful in allowing you to predict an answer when the law does not definitively answer the question.

For example, if you read in a treatise on defamation that "courts generally take the position that '[c]artoons are rhetorical hyperbole' . . . which cannot be reasonably construed as literal depictions of actual situations," then you might be able to make an informed prediction about a defamation action against your cartoonist client even if there is no law in your jurisdiction.[1] Similarly, if you know that, historically, courts have uniformly denied punitive damages where a civil plaintiff can't establish a right to compensatory damages, but that recently, some courts have allowed punitive damages in those cases, you know something about the modern trend of the law and can make a prediction even if there is a gap in your law, or even law against you in your jurisdiction.[2] This kind of general, overarching knowledge is essential to the researcher and will help you answer questions even if you have no on-point authority.

1. David A. Elder, *Defamation: A Lawyer's Guide* § 8:45 (2016).
2. Automobile Liability Insurance, 4th, § 27:20 (2016).

## §18.4 The Most Essential Points

Prepare ahead of time so that you have fully synthesized your authority and are confident in your conclusion and analysis.

Prepare a short, direct summary of your conclusion and analysis, which is the oral equivalent of the email answer or brief answer.

Prepare to answer questions while explaining your conclusion and analysis.

To help you answer questions knowledgeably, use a case chart and secondary sources so you have a comprehensive overview of the issue.

Your supervisor's time is a very limited resource. Use it *efficiently*. When you begin, get straight to the point and be brief.

## §18.5 Mistakes to Avoid

Imagine the scene through your supervisor's eyes. You don't want her to see you

- being long-winded or rambling,
- showing up with a pile of cases and no plan,
- losing focus and spending too much time on cases that are not relevant, or
- hiding weaknesses in the case or painting an unrealistically rosy picture of the client's position.

# 19 Client Advice Letters

## §19.1 Advice in Writing

Advice is explaining to a client how the law treats the client's situation. When you do that in writing, you'll write a *client advice letter*. This chapter explains how. A sample client advice letter is in Appendix E.

Client advice letters are about halfway between a conversation with the client and an office memo. They record the essence of what you would say to the client during a meeting in your office, and they often summarize ideas you worked out in detail earlier while writing an office memo.

Some lawyers use AI models to help with tasks such as writing letters, and this chapter will point out when generative AI might be helpful. When using AI in a professional context, always check to see whether your employer allows or prohibits it (in general or in terms of specific platforms), be mindful of rules around client confidentiality, and always verify that the content produced is accurate and all sources are valid. Additionally, please keep in mind that because of AI's rapid evolution, some of this advice may be outdated by the time the book hits the shelves.

When you need to provide a client with advice, start by deciding whether to do it in person, over the phone, or in writing. If the client is an individual, advice given only by letter might seem cold to the client. Conversation feels more personal, allows the client to ask questions, and allows for brainstorming about how to solve the problem. An advice letter can still be helpful as a recap of the advice you've already given in person. In addition, if a client has a complicated or difficult decision to make, the client might want a written explanation to refer to while thinking things over.

If the client is an organization, a larger proportion of the advice will be given solely by letter. For the most part, the problems are more complex, and

the people in the organization need conversation less because they're more experienced than individual clients are at dealing with the problems at hand.

## §19.2 Style and Tone in a Client Advice Letter

Perhaps the biggest challenge in writing a client advice letter is explaining complicated legal concepts to a reader who knows little or nothing about law. Some lawyers say that you don't really understand the law until you can explain it to a non-lawyer. To do that, identify the core concepts and then find everyday language that precisely expresses them.

The tone of a client letter should be professional and polite so the client feels supported and confident in your analysis. The tone will vary based on your relationship with the client and the type of case it is. In choosing a tone, ask yourself these questions:

What does the situation call for?
What would this client want from a professional?
What are you comfortable with in terms of your own style?
How do you want to present yourself to clients?

The second question — *What would this client want from a professional?* — may be the most complex. Consider the client's level of sophistication (education, occupation, experience with lawyers). And consider the client's feelings. Is the client experiencing anxiety, grief, or anger? Even in positive situations, such as buying property, happiness can be mixed with anxiety. Or is this transaction, from the client's point of view, pure business? It probably is if the client is an organization or a businessperson, if you have been hired on a matter the client considers routine, and if the client has a lot of experience with lawyers.

## §19.3 How to Organize a Client Advice Letter

Your advice to the client will likely be based on an office memo (Chapter 16) or email memo (Chapter 17), and the components are similar. Because the needs of the audience are different, you will adapt the legal analysis by cutting out a lot of the detailed legal authority and citations and focusing on the ideas. You wrote the memo for a supervising lawyer. Now write the letter for a client who knows little or nothing about the law.

A client letter has these parts:

1. the beginning formalities
2. one or two opening paragraphs, stating the problem and summarizing your advice
3. a brief review of the key facts

4. your advice in detail
5. a closing paragraph
6. the ending formalities

If the letter is complex, you might use headings to break it up, although you should adapt the wording in the headings to the client and the situation. The client advice letter in Appendix E is simple enough to need only a few headings.

**1. The beginning formalities will typically include (1) the office letterhead; (2) a confidentiality warning; (3) the date; (4) the client's name and address; (5) perhaps a reference to the letter's subject; and (6) the salutation.** Your employer will likely have a template for the first two components. A confidentiality warning generally reminds the client not to show the letter to other people without a good reason. It also suggests to others who accidentally see the letter that they are not to read it.

If the client is an organization, a "RE:" line might be helpful. It comes between the client's address and the salutation, is positioned close to the right-hand margin, and might include a number that would help the client identify its own records on the matter.

The salutation (*"Dear Ms. Naguchi:"*) always ends with a colon, never a comma.

**2. One or two opening paragraphs, stating the problem about which the client has sought your advice, and a brief summary of what your advice will be.** This corresponds to the issue and brief answer in an office memo. Whether you are delivering good news or bad news, your answer should be clear and direct. Trying to soften bad news by using waffle words could mislead the client into thinking there is a legal remedy when you think there isn't. Be polite, but direct.

**3. One or more paragraphs reviewing the key facts on which the advice is based, as you understand those facts.** You might think it wastes words to tell the client the client's own facts, but there are several good reasons for doing it.

First, if you've misunderstood any of the facts and the client knows better, the client can correct what's wrong. Many lawyers add a sentence asking the client to do that: "If I have described any of the facts inaccurately, please let me know."

Second, a fact recitation limits the advice to the facts recited, and that can be important in the future if the facts change. A tenant who doesn't have a claim against the landlord for a filthy lobby might have one next week if the lobby ceiling caves in.

Third, you might recently have learned of some facts the client doesn't yet know about. If so, describe the newly found facts in words that tell the client they are new: "Since we last spoke, I have discovered that the 1996 deed was never properly recorded in the county clerk's office."

And finally, a fact recitation is a good, professional transition into the advice itself.

**4. The advice, which can be structured in either of two ways.** First, if the client wants to know how the law treats a situation — "Would my company violate the law if we import this product?" — you'll predict how a court would likely rule, or you'll report the client's or other people's rights and obligations. The client asked a specific question, and you're answering it.

Alternately, if the client must make a decision, you'll counsel in the letter by giving the legal background that governs the situation, suggesting the options from which the client can choose and, for each option, explaining the factors that might make a given choice attractive or unattractive. In the advice portion of the letter, list the options and explain their advantages, costs, risks, and chances of success. When you estimate risks and chances of success, you are making predictions. Costs are not limited to money. The cost of suing includes not only legal fees and other litigation expenses, but also the time and energy the client would have to invest in the lawsuit and the stress most litigants suffer while the suit is in progress.

Be especially careful about the words you use to communicate the degree of confidence you have in your advice. When you write, "We have a reasonably good chance of winning at trial," you might mean that you believe the client will probably win although the risk of loss is significant. But many clients would read those words to mean that victory is nearly assured. That's because it's only human for a client who has suffered a wrong to assume that forces of justice will resolutely correct it. Don't, through vagueness, imply unjustified optimism. Find ordinary, everyday words that the client you're writing to will understand exactly as you mean them.

Conversely, if the news truly is bad, don't cushion it so much that the client will not appreciate it. Don't say, "Our chances in litigation are problematic," if what you really mean is, "It's very unlikely that such a lawsuit would succeed."

Use lawyer talk as little as possible. If a technical term has a good equivalent in ordinary English, use the ordinary word even if it does not convey 100 percent of the meaning of the technical term. If you use a technical term, define it. By talking law with other students and in class, you might forget that people outside law school don't understand what you have been studying so hard to understand.

A generative AI platform could be helpful in converting the analysis in a memo into language a lay person can understand (though you will lose the benefit of developing your own deeper understanding of the issues). If you do this, be careful to verify that the information is all still accurate.

When you translate lawyer talk into ordinary English, do it respectfully. This isn't just good communication, it's also good business. People often distrust a stereotyped lawyer who talks to everyone in legalese. But clients can like and trust a good human being who can explain things clearly and respectfully.

Write simply but don't oversimplify. If the law is unsettled, in flux, or unclear, explain that. The client will want to know why your advice is qualified by uncertainty in the law itself. Discuss authority only if it's central to the issue, such as a recent appellate case that changes everything you've told the client in the past.

Reciting the law can be cold and confusing (*"in this state, tax must be paid by the property owner on each lien against real property recorded in the county clerk's office"*). Describing its effect on the client is warm and often eliminates the need to recite the law (*"if you refinance the mortgage on your home, you'll have to pay $1,250 in mortgage tax"*).

Unlike the skeptical legal reader, a client who is a lay person assumes that the law is exactly what you say it is. You don't need to recite rules of law or cite and explain authority the same way you would in a memo or a brief. But you do need to know what you're talking about. Lawyers aren't perfect at predicting, but if you're so wrong as to not know what you're talking about, you'll lose clients and learn a lot about the details of malpractice law.

Organize the material in any way that helps the client understand it. Often that isn't through the paradigm formula described in Chapter 11. You aren't writing for the skeptical senior partner or judge to whom everything must be proved. You're writing for a lay person who won't easily understand what you know.

**5. One or two closure paragraphs.** Sum up your advice in two or three sentences. Specify what can or should be done next, who should do it, and when it should be done.

If the client must make a decision, set the stage for that. List the options from which the client will choose. Invite the client to telephone you. If extended conversation would be better, suggest that the client make an appointment to see you.

This is also a good place to note the extent to which your advice is conditioned on facts not yet known or events that haven't yet occurred. In some offices, the closure paragraphs include boilerplate sentences pointing out that the advice is limited to the facts recited earlier and to current law, which might change, and so on. Other offices don't include this kind of thing, on the assumption that it alienates clients.

**6. The ending formalities.** Place your signature over your typed name and under a parting phrase like, "Sincerely Yours" or "Best Regards" — whatever words are customary in your office.

# GENERAL WRITING SKILLS

# 20 Paragraphing

## §20.1 How Paragraphing Reveals Your Organization

Like all aspects of legal writing, your use of paragraphs should be deliberately designed to help your reader follow what you have written.

Readers unconsciously use paragraph divisions to learn how a writer's thoughts fit together. Readers assume that each paragraph substantiates or explores a separate and distinct idea or subject. They also assume that the first or second sentence in each paragraph states or implies that idea or subject and, if necessary, shows how it's related to matters already discussed. You want to conform your writing to these assumptions. Here's how.

Paragraphing has three goals.

1. **Chunking**: Paragraphs break your material up into digestible chunks.
2. **Making Your Purpose Clear:** Paragraphs help you discipline yourself to confront and develop each theme inherent in the material. Ask yourself: What is the purpose of this paragraph? What do I want the reader to learn from this?
3. **Making Your Logic Clear:** Paragraphs also make your organization apparent. If the reader feels lost or doesn't immediately know what the paragraph's thesis or topic is or how it differs from that of the preceding paragraph, there's something wrong. As you'll see in §20.4, the paragraph's first sentence is the one most often botched.

An effective paragraph has five characteristics. First, *unity*. It proves one proposition or covers one subject. Material more relevant to other propositions or subjects has been placed elsewhere.

Second, *completeness.* It includes whatever is necessary to prove the proposition (or some part of it) or cover the subject.

Third, *internal coherence.* Ideas are expressed in a logical sequence that the reader can easily follow.

Fourth, *readable length.* It's neither so long that the reader gets lost nor so short that valuable material is underdeveloped or trivialized.

Fifth, an effective paragraph *announces or implies its purpose* at the outset. Its first or second sentence states or implies its thesis or topic and, if necessary, makes a transition from the preceding material. Do a special edit of your document looking at the strategy of your paragraphing, using these criteria. You can also try to plug a paragraph or two into an artificial intelligence model and ask it if you've accomplished these goals. But, as always, you are the final judge of what is effective.

Paragraphing is not merely stylistic. When you set out to fix problem paragraphs, you will often find yourself noticing and fixing analytical problems as well.

## §20.2 Probative Paragraphs and Descriptive Paragraphs

Some paragraphs *describe* conditions or events; they convey information without analysis. In descriptive writing, the paragraph states information, and the first or second sentence tells the reader the paragraph's topic or theme, if that isn't already evident from the context. In legal writing analysis, paragraphs often go beyond description and *prove* propositions that help resolve issues. In probative writing, the paragraph exists to prove its first or second sentence, which states the paragraph's *thesis.*

Probative and descriptive writing can occur in the same document. For example, in an office memorandum, the Statement of Facts will predominantly contain description, while in the Discussion section the writing should be largely probative.

Here's an example that shows the difference between a topic that is merely a category of information ("weather in Death Valley") and a thesis that is a proposition capable of proof or disproof ("the climate of Death Valley is brutal"):

| *Descriptive* | *Probative* |
|---|---|
| In January in Death Valley, the average high temperature is about 65°, and the average low is about 37°. Spring and fall temperatures approximate summer temperatures. | The climate in Death Valley is brutal. At Furnace Creek Ranch, the highest summer temperature each year reaches at least 120° — and in many years at least 125°. The highest |

In April and in October, for example, the average high is about 90°, and the average low about 60°. July is the hottest month, with an average high of about 116° and an average low of about 87°. The highest temperature reliably recorded in Death Valley was 130° on August 16, 2020. Average annual rainfall is about 2½ inches.

temperature reliably recorded in Death Valley — 130° — is also the highest undisputed temperature recorded anywhere on earth. In an average year, only 2½ inches of rain fall. In the summer sun, a person can lose 16 quarts of perspiration a day and — in 3% humidity — die of dehydration.

A confused reader of descriptive writing might ask, "What is this paragraph about?" But a confused reader of probative writing asks instead, "What is this writer trying to prove?"

One of the key differences between legal writing and many other types of writing is that legal writing does not build to a conclusion. Legal writing starts with the conclusion and then proves it. Recitation or description of bare facts is not a proof. Proof is an explanation of *how* the facts support the inference.

## §20.3 Thesis Sentences, Topic Sentences, and Transition Sentences

A probative paragraph states its thesis in its first or second sentence, and that sentence is the *thesis sentence.*[1] A descriptive paragraph does the same with its *topic* unless the topic is implied by the context. In probative writing the thesis should be expressly stated. (Remember that a practical reader needs to know your purpose in saying things before you start saying them.) With either type of paragraph, a *transition sentence* helps show the reader how the paragraph is connected to the material before it or the material after it.

Thesis, topic, and transition sentences can be worked into a paragraph in several different ways. A transition sentence most often appears at the beginning of a paragraph, less often at the end (as a bridge into the next paragraph), and not at all if a transition is unnecessary. The first sentence in a paragraph can often do double duty, stating both a thesis or topic and making a transition. Where a paragraph's thesis or topic is complex, the paragraph might end with a closure sentence that ties up loose ends.

1. In college, "thesis sentence" is sometimes used to refer to a sentence that sums up the meaning of an entire essay. Here, it has a different meaning.

## §20.4 The Two Most Common Ways of Botching a Paragraph's Beginning

The two most common ways of botching the beginning of a paragraph are (1) omitting entirely any statement of the thesis or topic, and (2) using a topic sentence instead of a thesis sentence to begin a probative paragraph. Either problem can force a legal reader to read the paragraph two or three times to figure out its purpose.

1. *Botching the beginning by omitting any indication of the thesis or topic:* The habit of announcing or implying a paragraph's purpose at the beginning is a kind of self-discipline. Because it forces you to articulate the paragraph's reason for being, it will encourage you — especially during rewriting — to limit the paragraph to one thesis or topic (unity), to do whatever is necessary inside the paragraph to prove that thesis or cover that topic (completeness), and to express the ideas in the paragraph in a sequence appropriate to the thesis or topic (coherence). If a statement of the topic or thesis is missing, that often means that you don't yet know what the paragraph is supposed to accomplish. Ask yourself: what, in one sentence, am I trying to say in this paragraph? That is your topic or thesis sentence. Then, check all the following sentences in the paragraph, asking yourself if each sentence is a necessary step in proving the point of the paragraph. If they are not necessary, take them out. If they are necessary steps, ask *how* the sentence ties into the main idea, and see if you can make that clearer to the reader.

2. *Botching the beginning by using a topic sentence to begin a probative paragraph:* Consider this probative paragraph, which begins with an unhelpful topic sentence:

> The federal bank robbery statute penalizes obtaining anything of value from a bank "by force and violence, or by intimidation." 18 U.S.C. § 2113 (2000). Several cases have defined the term "intimidation." For example, a defendant takes by intimidation when he hands a bank teller a note reading "Put all your money in this bag and nobody will get hurt." *United States v. Epps,* 438 F.2d 1192 (4th Cir. 1971). The same is true where a defendant, while holding his hand in his pocket to suggest that he has a weapon, hands a teller a note reading, "This is a holdup." *United States v. Harris,* 530 F.2d 576 (4th Cir. 1976). And even where a teller never sees a weapon, intimidation is proved where a defendant produces a note stating, "I have a gun. Give me all the bills or I will shoot you." *United States v. Jacquillon,* 469 F.2d 380 (5th Cir. 1972).

The purpose of this paragraph is to prove a definition of "intimidation." But the first sentence doesn't tell you this and therefore it isn't a thesis sentence. The first sentence announces only a topic — the federal bank robbery statute — and thus doesn't communicate what the paragraph is meant to prove. In fact, *no* sentence in the paragraph sets out the definition that the paragraph is intended

to prove. To the reader who needs to know what "intimidation" is, a paragraph like this one is frustrating to the point of impatience. The reader wants to know exactly what you're trying to prove *before the proof begins.* Most of the problem could be solved with an accurate thesis sentence like this:

> Courts have defined "intimidation" in the federal bank robbery statute as conduct reasonably calculated to produce fear, even in the complete absence of physical violence.

This thesis sentence gives the whole paragraph meaning because it synthesizes the holdings of the cases into a definition that the paragraph will go on to prove.

Once you've replaced a topic sentence with a thesis sentence, some rewording and reordering of other sentences might be needed to give the paragraph coherence — to show, in other words, *how* the rest of the paragraph proves the thesis. Notice below how the earlier version has been changed so that it now seems to flow straight from the new thesis sentence:

> Courts have defined "intimidation" in the federal bank robbery statute as conduct reasonably calculated to produce fear, even in the complete absence of physical violence. For example, even where a teller never actually sees a weapon, a note stating, "I have a gun. Give me all the bills or I will shoot you" is intimidation. *United States v. Jacquillon,* 469 F.2d 380 (5th Cir. 1972). More vaguely expressed threats are treated the same way. A defendant takes by intimidation when he hands a bank teller a note reading, "Put all your money in this bag and nobody will get hurt." *United States v. Epps,* 438 F.2d 1192 (4th Cir. 1971). And the result is the same even where the threat is entirely implied — for example, where a defendant, while holding his hand in his pocket to suggest that he has a weapon, hands a teller a note reading, "This is a holdup." *United States v. Harris,* 530 F.2d 576 (4th Cir. 1976).

If your prior writing experience has primarily been descriptive — and that's true of most law students — you'll need to discipline yourself to see the difference between a descriptive paragraph and a probative one. And you'll have to be careful to begin probative paragraphs with thesis sentences. You will probably find that this kind of self-discipline forces you to make your meaning more clear to the reader throughout the paragraph — and that, consequently, you'll analyze more deeply.

When you begin a probative paragraph with a topic sentence — or when you write a paragraph that doesn't state or imply a thesis or topic — in all likelihood you didn't know when you began to write the paragraph what you intended to prove or describe within it. In a first draft, that's okay. The purpose of a first draft is to get the material out in the open so you can finish analyzing it. But during rewriting, when you find a topic sentence atop a probative paragraph — or when you find a paragraph with no thesis or topic sentence at

all — that's often a clue that you have not yet begun to articulate *even to yourself* what you are trying to accomplish in the paragraph. But this problem isn't hard to solve. Merely asking yourself, "What am I trying to prove here?" often produces, almost instantly, a thesis sentence that gives the whole paragraph meaning and relevance.

## §20.5 How to Test Your Writing for Effective Paragraphing

In first drafts, paragraphs are seldom put together well. Instead, the work of paragraphing generally occurs during re-writing. To identify paragraphs in need of rehabilitation, ask yourself the following questions.[2]

**20-A** **Have you stated or implied, within the first two sentences, the probative paragraph's thesis or the descriptive paragraph's topic?** If the reader does not learn the paragraph thesis or topic at the beginning, the reader is forced to read the paragraph two or three times to figure out its purpose. The only time you're exempt from this requirement is when the context clearly implies the topic or thesis.

**20-B** **Have you gotten rid of throat-clearing introductory sentences, which delay the paragraph's thesis or topic?** For example:

> The district court considered this question in *Pickett.* There, the court showed limited patience with the way the parties referred to themselves and each other. It did agree to call one defendant Guitar Maker Oswald Who Lives in Germany. But it refused to call another The Artist Formerly Known as Prince, or even just "the Artist," and it refused to allow that defendant to use his guitar symbol in place of his name in the captions of pleadings and motions. Instead, the court just called him Nelson.

You can combine the first two sentences into a single thesis or topic sentence that goes straight to the point:

> In *Pickett,* the district court showed limited patience with the way the parties referred to themselves and each other. . . .

2. When marking up your work, your teacher might refer to these questions by using the number-letter codes that appear next to each question here.

**20-C** **Have you given each paragraph a unified purpose?** Prove one proposition or cover as much of one subject as is digestible in one paragraph. Remove and place elsewhere material that is more relevant to other propositions or subjects.

**20-D** **Within each paragraph, have you expressed your ideas in a logical and effective sequence?** It is important that the sentences in your paragraph proceed in a logical order that is easy for the reader to follow. Think of the sentences as the links of a chain that all fit together. Look back at your paragraphs and see whether the order is logical.

**20-E** **Have you broken up paragraphs that were so large that the reader would have gotten lost?** Although no set rules govern paragraph length, paragraphs that go on for a page or more defeat the purpose of paragraphing and probably contain too many different ideas. The cure is to identify the individual themes and then break up the material accordingly into digestible chunks (which become separate paragraphs).

**20-F** **Have you rewritten paragraphs that were so short that no thesis or topic is developed?** Generally, one- and two-sentence paragraphs are ineffective unless you have a special reason for emphasizing something or for separating out uncomplicated material. When used carefully, short paragraphs can clear up simple preliminary matters or emphasize some memorable aspect of the material. If a paragraph is so short that no thesis or topic is developed, ask yourself whether (1) you might have missed the complexities of the thesis or topic, or (2) the thesis or topic might be so simple that it doesn't merit treatment in a separate paragraph because it's actually part of some other thesis or topic.

**20-G** **Have you stated or implied how each paragraph is related to the surrounding material?** The paragraph can begin with a transition sentence or a sentence that both makes a transition and states a thesis or topic. Or the last sentence of the preceding paragraph can build a bridge to the next paragraph.

## Exercise I
## The First Weeks of Law School (Probative and Descriptive Paragraphs)

Write two paragraphs — one descriptive and the other probative — about the first weeks of law school.

*Descriptive paragraph*: Summarize what happened during your first weeks in law school. Describe only things you saw, heard, read, and wrote. Do not try to prove any belief you might have about the first weeks of law school.

*Probative paragraph*: The opening sentence of this paragraph should be "The first weeks of law school are hard (or "puzzling," or "exciting," or "cruel," or "challenging," or any other characterization you choose) because . . ." — and here, you complete the sentence by stating whatever you believe to be the cause of your characterization. The rest of the paragraph should prove the thesis expressed in this sentence.

## Exercise II
## Escape from Prison (Paragraph Unity, Coherence, and Length)

Is the paragraph below limited to proving a single proposition or covering a single subject? If not, what material is extraneous? Is the paragraph of an appropriate size? If you believe it's too long, how should the problem be solved? Are the ideas expressed in a sequence that enables you to understand the meaning of the paragraph without reading it twice? If not, what sequence would be better? Edit the paragraph in light of your answers to these questions. Add any thesis, topic, or transition sentences that you think are needed. (Each sentence is preceded by a letter in brackets so that you can refer to it in class without having to read the sentence aloud.)

> [A] A prisoner who leaves a prison without permission is guilty of a crime of escape. [B] Until relatively recently, the defense of necessity was not available in California to a prisoner who claimed that prison conditions were so intolerable as to require escape. [C] An early case, for example, affirmed a conviction for escape, conceding that "if the facts were as stated by the defendant, he was subjected to brutal treatment of extreme atrocity" in a "remote" mountain prison camp far from any authorities to whom he might complain. *People v. Whipple*, 100 Cal. App. 261, 266, 279 P.2d 1008, 1010 (2d Dist. 1929). [D] And a more recent case affirmed a conviction where the defendant offered evidence that other prisoners had threatened to kill him, and that prison guards had refused to protect him. *People v. Richardson*, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597 (1st Dist. 1969). [E] Both *Whipple* and *Richardson* cited 1 Hale P.C. 611 for the proposition that escape from prison can be excused only to avoid death as immediate as that threatened when the prison itself is engulfed in fire. [F] But drawing on decisions from other jurisdictions, the Court of Appeal for the Fourth District has held that, through a "limited defense of necessity," a prisoner can defeat a prosecution for escape if the prisoner can demonstrate (1) that she or he was "faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future," (2) that a complaint to the authorities would have been futile or not possible, (3) that the same was true regarding resort to the courts, (4) that the prisoner used no "force or violence" in escaping, and (5) that the prisoner surrendered to the authorities "when he [had] attained a position of safety from the immediate

threat." *People v. Lovercamp*, 43 Cal. App. 3d 823, 831-32, 118 Cal. Rptr. 110, 115 (4th Dist. 1974). [G] Even under this test, Victor Minskov does not have a defense to the charge of escape. [H] He had been beaten twice by a group of prisoners who threatened to attack him as long as he remained in the same prison. [I] He scaled the prison wall at 4 AM immediately after the second beating and while being chased by the same group. [J] After the first beating, he had complained to prison guards, who laughed at him, and during the second beating his cries for help brought no response. [K] The courts would not have been able to protect him from such an assault, and he used no force or violence in escaping. [L] But after leaving the prison he hid under an assumed name for 16 months and was finally captured at the Los Angeles airport trying to leave the country. [M] Thus, he will not be able to show that he complied with the last element of the *Lovercamp* test by surrendering to the authorities upon attaining "a position of safety from the immediate threat."

# 21 Effective Style

## §21.1 Clarity and Vividness

> The difference between the *almost* right word and the right word is . . . the difference between the lightning bug and the lightning.
>
> —*Mark Twain*

English has a vast vocabulary that can express with precision a very wide range of nuance—if you can find the "right" word. But with so many similar words to choose from, it's easy to choose the "wrong" one—the word that blurs meaning, rather than sharpening it.

Important-sounding words tend to be less vivid and less precise than simple and straightforward ones. The following doesn't say as much as it should: "The victim *indicated* that the defendant had held the gun." Did the writer mean "The victim *said* that the defendant had held the gun"? Or did she mean "The victim *pointed* at the defendant when asked who had held the gun"? To the reader who needs to know exactly what happened, *indicated* obscures the truth rather than communicating it. The simpler word often says more than the more important-sounding one. Important-sounding words are often euphemistic and fuzzy, rather than crisp and vivid.[1] They are one of the reasons many people dislike reading poor legal writing—it is alienating and difficult.

Your job is to make your reader's job easy. That usually means using simple, clear words. You will impress your reader by your ability to translate the often

1. Both tendencies are described in George Orwell's most famous essay, *Politics and the English Language*.

difficult, complex and overly obfuscatory prose of judicial opinions and statutes. You will not impress her by using fancy words. In fact, in one study, appellate judges and their law clerks were asked to appraise material written in a pretentious style that might be called "legalese," while other judges and their law clerks were asked to evaluate the same material rewritten into straightforward "plain English." They thought the original legalese "substantively weaker and less persuasive than the plain English versions."[2] And the judges and law clerks assumed that the traditional legalese had been written by lawyers working in low-prestige jobs.[3]

Don't write like this:

> The above captioned appeal is maintained by the defendant as a direct result of

Instead, write like this:

> The defendant appeals because

To understand the importance of clarity in law, remember two things. First, you must prove everything you say, because the legal reader considers every unsupported assertion to be the equivalent of an untruth. Second, no matter how important the issue, your reader does not want to spend more time than necessary learning about it. She does not want to experience the struggle you went through to understand all the statutes and cases in an issue; she wants you to make it easy for her to learn it quickly. That is your job. And she isn't reading for pleasure, as she might with James Joyce or Virginia Woolf. "[A] cardinal principle of good writing [is] that no one should ever have to read a sentence twice because of the way it is put together."[4]

When it comes to clarity, the reader is always right: "If the reader thinks something you wrote is unclear, then it is, by definition. Quit arguing."[5]

2. Robert W. Benson & Joan B. Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing,* 20 Loyola L.A. L. Rev. 301, 301 (1987). Other research has produced similar results. *See, e.g.,* Sean Flammer, *Persuading Judges: An Empirical Analysis of Writing Style, Persuasion, and the Use of Plain English,* 16 J. Legal Writing 183 (2010).
3. Benson & Kessler, *supra* n.2, at 301-02.
4. Wilson Follett, *Modern American Usage* 480 (1974).
5. Donald McCloskey, *The Writing of Economics* 7 (1987).

## §21.2 Conciseness

> The present letter is a very long one simply because I had no time to make it shorter.
>
> — *Pascal*

Most first drafts use too many words to communicate a given idea effectively. That's because the writer is still working out what she thinks. Once the writer has a better handle on what she wants to say, it is time to rewrite it. Part of rewriting is disciplining yourself to trim your words down to something easily read and quickly understood. Compare two explanations of *Sherwood v. Walker,* a mutual-mistake-of-fact case that appears in most Contracts casebooks. The first draft is on the left. The rewrite, on the right, uses fewer words to express the same concept both concisely and more clearly.

| | |
|---|---|
| It is important to note that, at the time when the parties entered into the agreement of purchase and sale, neither of them had knowledge of the cow's pregnant condition. | When the parties agreed to the sale, neither knew the cow was pregnant. |
| Because of the fact that the cow, previous to the contract, had not become pregnant, despite planned and observed exposure to bulls whose reproductive capacities had been demonstrated through past experience, the seller had made the assumption that the cow would not be able to produce offspring. | The seller had assumed that the cow was infertile because she had not become pregnant when he tried to breed her. |
| Due to the fact that the seller had made a statement to the buyer describing the cow's opportunities to reproduce and the failures thereof, there would have been, in the buyer's thinking, no purpose to any further investigation or inspection he might have considered making. | Because the seller had told the buyer about the cow's history, the buyer did not investigate further. |
| For these reasons, the contract did not include a provision for an upward modification in the payments to be made by the buyer to the seller in the event that the cow should later prove to be capable of reproduction. | Thus the contract did not provide for an increase in the purchase price if the cow should turn out to be fertile. |

How did the writer convert the verbose first draft on the left into the concise final draft on the right?

First, the writer rewrote some sentences so that a person or a thing *did* something. Although the verbose draft is weighted down with modifiers, the concise version focuses on well-chosen nouns and verbs, and many modifiers became unnecessary as the writer incorporated their meaning into those nouns and verbs (and sometimes into more succinct modifiers):

| | | |
|---|---|---|
| the cow's pregnant condition | *became* | the cow was pregnant |
| despite planned and observed exposure to bulls whose reproductive capacities had been demonstrated through past experience | *became* | when he tried to breed her |
| there would have been, in the buyer's thinking, no purpose to any further investigation or inspection he might have considered making | *became* | the buyer did not investigate further |

Second, the writer eliminated phrases that didn't add any meaning:

| | |
|---|---|
| It is important to note that | *was deleted because the "importance" is communicated by the sentence's placement and, ironically, by the rewritten version's brevity* |
| previous to the contract | *was deleted because it's communicated by the context* |

Third, the writer weighed each word and phrase to see if the same thing could be said in fewer words:

| | | |
|---|---|---|
| at the time when | *became* | when |
| entered into the agreement of purchase and sale | *became* | agreed to the sale |
| neither of them | *became* | neither |
| had knowledge of | *became* | knew |
| Because of the fact that | *became* | because |

| | | |
|---|---|---|
| had made the assumption | *became* | assumed |
| would not be able to produce offspring | *became* | was infertile |
| Due to the fact | *became* | Because |
| had made a statement to | *became* | told |
| describing the cow's opportunities to reproduce and the failures thereof | *became* | about the cow's history |
| For these reasons | *became* | Thus |
| include a provision for | *became* | provide for |
| an upward modification in the payment to be made by the buyer to the seller | *became* | an increase in the purchase price |
| in the event that | *became* | if |
| the cow should later prove to be capable of reproducing | *became* | the cow should turn out to be fertile |

Be careful, however, not to edit out needed meaning. It would be folly to eliminate so much verbiage that a reader wouldn't know that the cow was pregnant when sold; that the parties didn't know of the pregnancy at the time; that the contract didn't provide for an adjusted price; and why it didn't do so.

## §21.3 Forcefulness

Forceful writing *engages* the writer.[6] Forceful writing leads the reader through ideas by specifying their relationships with one another and by identifying the ideas that are most important or compelling.

6. Mark K. Osbeck, *What Is "Good Legal Writing" and Why Does It Matter?*, 4 Drexel L. Rev. 417 (2012).

*Specify relationships.* Transitional words and phrases, such as the following, can very economically show relationships between ideas:

| | |
|---|---|
| accordingly | in fact |
| additionally | (in order) to |
| although | in spite of |
| analogously | in that event |
| as a result | instead |
| because | moreover |
| but | nevertheless |
| consequently | not only . . . , but also |
| conversely | on the contrary |
| despite | the other hand |
| even if | on these facts |
| even though | rather |
| finally | similarly |
| for example | since |
| for instance | specifically |
| for that reason | such as |
| furthermore | there |
| hence | therefore |
| here | thus |
| however | under these circumstances |
| in addition (to) | while |
| in contrast | |

Some transitional words and phrases are stronger than others. Choose those that accurately represent the relationship.

For example, some words are better than others at showing causation. *Because* is the clearest. *Since* can work, but is not as clear as *because*. Try to avoid the vague *as* and *so* to show causation. Both *as* and *so* can confuse a reader who sees them used much more often — and much more effectively — to join contemporaneous events ("the muggles gasped as Harry flew past on his Nimbus 2000") or to emphasize the abundance of some fact ("they were so astonished that . . ."). *Since* can also mean time ("it's been ages since we've seen each other"), which makes it less clear than *because* to show causation.

> Because the defendant spent the marital assets on extravagances, the plaintiff has no money for attorney's fees.

If this had begun with *since*, you wouldn't have known until near the end of the sentence whether the dependent clause introduced causation or marked a point in time.

Some words and sentence structures show contrast better than others do. Consider this:

> The Court of Appeal has held that the objection is waived if not made at trial, but it has also held that, even without an objection, a conviction should be reversed where a prosecutor's conduct was as inflammatory as it was here.

The word *but,* buried in the middle of a long sentence, only weakly tells the reader that one idea (the rule about waiver) is being knocked down by another (the exception for inflammatory prosecutorial conduct). Everybody writes this kind of thing in first drafts, but you should recognize and fix it during rewriting:

> Although the Court of Appeal has held that the objection is waived if not made at trial, it has also held that, even without an objection, a conviction should be reversed where a prosecutor's conduct was as inflammatory as it was here.

*Although* tells the reader from the very beginning of the sentence that the first clause, however damning, will be shown soon not to matter. If handled carefully, however, *but* can still do the job well:

> The Court of Appeal has held that the objection is waived if not made at trial. But it has also held that, even without an objection, a conviction should be reversed where a prosecutor's conduct was as inflammatory as it was here.

This solves the problem in a different way. The sentence has been broken in two, and the new second sentence begins with *But.* (Despite common belief, no rule of grammar forbids starting a sentence with a conjunction.)

When you discuss several ideas together, you can make that clear to the reader through some sort of textual list. The list need not be diagrammed. In fact, it's usually more economical to incorporate a list into the text with a transition sentence ("There are four reasons why . . ."), followed by sentences or paragraphs coordinated to the transition sentence ("First . . ." or "The first reason . . .").

*Identify the most important ideas.* There are several methods. One is simply to say it:

> This attorney's most reprehensible act was to make a motion for a preliminary injunction where his clients were not in any way threatened with harm.

Other methods are more subtle. You can put an emphasized idea at the beginning of a sentence, paragraph, or passage, where it will be most quickly noticed. Or, as in the paragraph below, you can write a series of sentences that lead up to one that succinctly conveys the emphasized idea:

This attorney served and filed a pleading alleging extremely unlikely facts without making any factual investigation.

He made numerous frivolous motions, including one for a preliminary injunction when his clients were not threatened with harm. He has now brought an appeal without any basis in statute or precedent, and he has submitted a record and brief not in compliance with the court's rules. He has thoroughly disregarded the professional obligations of an attorney.

## §21.4 Punctuation and Other Rules of Grammar

### In re HAWKINS
502 N.W.2d 770 (Minn. 1978)

[The Lawyers Professional Responsibility Board petitioned the court for an order disciplining the respondent lawyer for unethical conduct.]

The referee . . . found that respondent's failure to comply with [certain court rules] and his repeated filing of documents rendered unintelligible by numerous spelling, grammatical, and typographical errors were sufficiently serious that they amounted to incompetent representation. . . .

It is apparent to us that [respondent's] repeated disregard of [court rules], coupled with the incomprehensibility of his correspondence and documentation, constitutes a violation of Rule 1.1 of the Minnesota Rules of Professional Conduct. . . .

. . . Public confidence in the legal system is shaken when lawyers disregard the rules of court and when a lawyer's correspondence and legal documents are so filled with spelling, grammatical, and typographical errors that they are virtually incomprehensible. . . .

Respondent . . . is hereby publicly reprimanded for unprofessional conduct [and ordered, among other things, to participate in a program of writing instruction].

---

In another case, a trucking company and the Interstate Commerce Commission battled for 19 years over the confusion caused by the absence of a single comma in an administrative order,[7] and the Maine Supreme Court had to write a 2,000-word decision to untangle the mess created by two commas that somehow ended up in the wrong place in a statute.[8]

Correct punctuation makes writing clear and easier to understand. It's not mere decoration. A lawyer can't excuse a poorly punctuated sentence by arguing that the reader would be able to understand it if she or he would think about it. A lawyer's job is to make meaning so plain that the reader doesn't need to read the sentence twice.

7. *T. I. Mccormack Trucking Co. v. United States*, 298 F. Supp. 39 (D.N.J. 1969).
8. *Sawyer v. State,* 382 A.2d 1039 (Me. 1978).

Punctuation and other grammar skills have an important effect on your credibility and reputation. Readers — including graders of law school exams — will question your analytical abilities and general competence if you don't observe the accepted rules of English grammar. "Where lumps and infelicities occur," the novelist John Gardner wrote, "the sensitive reader shrinks away a little, as we do when an interesting conversationalist picks his nose."[9]

## §21.5 How to Test Your Writing for Effective Style

> [I]t is a struggle to make a sentence say exactly what you mean.
>
> — *Arthur Koestler*

In first drafts — even by the best writers — style is usually pretty awful. Effective style is really achieved through rewriting, as you spot style problems and fix them. While rewriting, ask yourself the following questions.[10] You can also employ artificial intelligence models to check for style and grammar issues. Most grammar checkers (Word Editor, Grammarly) are excellent at spotting grammar errors. Artificial intelligence models can do this as well, and can additionally check for harder to spot style issues. Your writing teacher may give you a checklist of your own writing problem areas. We all have them — and it is often very hard for us to spot these weaknesses in our own writing. So, if your professor allows, use these tools to help! They can often help you spot something you missed.

**21-A** **Do your nouns and verbs let the reader see the action?** As you write and rewrite, ask yourself what words will *engage* the reader.[11] What words will bring the reader into your thinking? For example:

| | |
|---|---|
| **wrong:** | In *Smith,* there was no withdrawal of the guilty plea, based on the court's determination of a lack of evidence of coercion. |
| **right:** | In *Smith,* the court denied the defendant's motion to withdraw her guilty plea because she submitted no evidence that the plea had been coerced. |
| **wrong:** | There is a possibility of action in the near future by the EPA to remove these pesticides from the market. |
| **right:** | The EPA might soon prohibit these pesticides. |

9. John Gardner, *The Art of Fiction: Notes on Craft for Young Writers* 99 (Knopf 1984).
10. When marking up your work, your teacher might refer to these questions by using the number-letter codes that appear next to each question here.
11. Osbeck, *supra* note 6.

In the "wrong" examples, you can barely tell who has done what because the ponderous tone obscures the action, and because the nouns and verbs are vague and lazy. They don't stand out, take charge, and create action. The "right" examples are more vivid and easier to understand. You immediately know what's going on and don't need to read the same words twice.

In law, people do things to ideas, objects, and other people. The only way to describe that clearly is with relatively plain and simple nouns and verbs. As with so many other legal writing problems, rewriting is the key to solving this one. Your early drafts might have sentences like the "wrong" examples above, but your final drafts should more closely resemble the "right" ones. Here is how to do it:

*Nouns:* As you rewrite, figure out who is doing things and make those people and organizations the subjects of sentences and clauses. Grammatically, only the subject gets to act. In the first two examples above, the main event was what the court did, which is why the court had to become the subject of the sentence. But the defendant did something, too, (or, more accurately, failed to do something) and she thus became the subject of a clause inside the sentence.

*Verbs:* As you rewrite, do two things.

First, wherever possible, replace the verb *to be* with an action verb. The verb *to be* includes *is, are, am, was, were*, and *will be.* They do a good job of describing condition or status ("the defendant is guilty"). But they aren't verbs of action. In fact, they obscure action. If somebody is doing something, find an action verb to express it. In particular, find ways of eliminating variations on *there is* (such as *there were* and *it is*). Sometimes these constructions are helpful or even unavoidable ("there are four reasons why the plaintiff will not be able to recover. . . ."). At other times, however, they hide your message in a fog of excess verbiage ("inside the locker there was a loaded gun" should become "a loaded gun was in the locker").

Fixing this isn't hard. During rewriting (Chapter 5, §5.7), use the "find" feature in your word processor to search for *are*, *is*, and *was*. Every time you find one, consider replacing it with an action verb. In some instances, that will strengthen your writing, and in others it won't. Sometimes the only way to express an idea is to use the verb *to be*. Decide one way or the other. If you have been overusing the verb *to be*, replacing it with action verbs can transform your writing so that it immediately becomes more lively and vivid.

Second, replace nominalizations with genuine verbs. A nominalization is a phrase that converts a simple verb into a complicated noun or noun-phrase. "The search *was a violation of* the defendant's rights" should become "the search *violated* the defendant's rights." The nominalized phrase *was a violation of* is weaker and wordier than the blunt and vivid verb *violated.* The same problem occurs when you ask an adjective to do a verb's job ("was violative of"). Some other examples:

| *delete these* | *and replace them with these* |
|---|---|
| is able to | can |
| enter into an agreement | agree |
| make the argument that | argue that |
| make the assumption that | assume that |
| is aware of | knows |
| is binding on | binds |
| give consideration to | consider |
| make a determination | determine |
| make an objection | object |
| make payment to | pay |
| make provision | Provide |

**21-B** **Have you used verbs that show the precise relationship between subjects and objects?** For example:

**wrong:** The court *dealt with* common-law larceny.

What did the court do to larceny? Define it? Define only one of the elements? Clarify the difference between larceny and false pretenses? Decide that that offense no longer exists because the legislature has replaced it with the statutory crime of theft? The sentence would be much better with a verb that tells the reader precisely what happened.

**wrong:** The Freedom of Information Act *applies* to this case.

Does the Act require that the document at issue be published in the Federal Register? Does it require that the document be given to anyone who asks for a copy? Does it require that the document be available for photocopying, but not at government expense? Or does it give the government permission to refuse to do any of these things? We would know more if *applies* were replaced with a verb that communicates exactly what the Act really does.

**wrong:** Section 452(a) *involves* the Rule Against Perpetuities.

Here, *involves* communicates only that § 452(a) has some connection with the Rule Against Perpetuities. Has § 452(a) codified the Rule? Modified it? Abolished it?

The three verbs illustrated here — *deal with, apply*, and *involve* — rarely communicate a precise relationship between a subject and an object.

**21-C** **Have you brought the reader to the verb quickly?** Consider this:

> The defendant's solicitation of contributions through an organization with a misleading name, immediate deposit of the funds in a bank account in the Bahamas, and eventual use of the money to buy a vacation home in his own name constitutes fraud.

The verb is what ties an English sentence together. In fact, an English sentence is incomprehensible until the reader has identified both a subject *and* a verb. And the most easily understood sentences bring the reader to the verb as quickly as possible. The example above can't be understood in a single reading because it's front-loaded. The reader doesn't reach the verb and object ("constitutes fraud") until after plowing through a 39-word subject.

Sentences like that are caused by automatically making whatever you want to talk about the subject of the sentence. "What shall I talk about next?" you ask yourself and then write down the answer. That becomes the subject of a sentence, no matter how unreadable the result. In first drafts, you can't avoid doing this, but in later drafts you should recognize the problem and fix it.

Front-loaded sentences can be fixed in either of two ways. The first is to simplify the subject so you can bring the reader to the verb quickly:

> The defendant committed fraud by soliciting contributions through an organization with a misleading name, immediately depositing them in a Bahamian bank account, and eventually using the money to buy a vacation home in his own name.

The other cure is to break the original sentence in two:

> The defendant solicited contributions through an organization with a misleading name, immediately deposited them in a Bahamian bank account, and eventually used the money to buy a vacation home in his own name. This was fraud.

You'll lose control of your sentences if you just let them happen. Each sentence must be *built*.

**21-D** **Have you put the verb near the subject and the object near the verb?** A sentence is hard to understand if you insert a clause or phrase between a subject and a verb, or between a verb and an object:

> Grateful Dead Productions, despite the Dead's reputation for tolerating and even encouraging bootleg tapings of concerts when they were still giving them, has several times sued for copyright infringement when the band's albums have been bootlegged.

The solution is to move the clause or phrase to the end or to the beginning of the sentence, leaving the subject and verb (or the verb and object) relatively close together.

| | |
|---|---|
| **move phrase or clause to the END of the sentence** | Grateful Dead Productions has several times sued for copyright infringement when the Dead's albums have been bootlegged, despite the band's reputation for tolerating and even encouraging bootleg tapings of concerts when they were still giving them. |
| **move phrase or clause to the BEGINNING of the sentence:** | Despite the Grateful Dead's reputation for tolerating and even encouraging bootleg tapings of concerts when they were still giving them, Grateful Dead Productions has several times sued for copyright infringement when the band's albums have been bootlegged. |

The clause or phrase should begin the sentence only if you want to emphasize it.

**21-E** **Have you used transitional words and phrases to show how ideas are related?** Beginners often underestimate the reader's need to be told explicitly how ideas fit together or contrast with one another. You can do this economically with transitional words and phrases. See the ones listed in §21.3.

**21-F** **Have you streamlined wordy phrases?** Good rewriting pares a convoluted phrase down to something straightforward:

| *delete these* | *and replace them with these* |
|---|---|
| because of the fact that | because |
| during such time as | during |
| for the purpose of | to |
| for the reason that | because |
| in the situation where | where |
| in the case of | in |
| in the event that | if |
| make a motion | move |
| subsequent to | after |
| take into consideration | consider |
| until such time as | until |
| with regard to | regarding |
| with the exception of | except |

**21-G** **Have you deleted throat-clearing phrases (also known as "long windups")?** Phrases like the following waste words, divert the reader from your real message, and introduce a shade of doubt and an impression of insecurity:

It is significant that . . .
The defendant submits that . . .
It is important to note that . . .
The next issue is . . .

Of the two examples below, why would the plaintiff's lawyer feel more comfortable writing the first than the second?

> The plaintiff submits that the judgment should be reversed because . . .
>
> The judgment should be reversed because . . .

The unnecessary words in the first example shift emphasis from the idea propounded and to the obvious but irrelevant fact that the writer is the one doing the propounding. (But it is *not* ineffectual to begin an attack on an adversary's argument by beginning with phrasing like, "Although the defendant has argued . . .")

**21-H** **Have you broken up or streamlined unnecessarily long sentences?** If a sentence is too long to be understood easily on the first reading, express the sentence's ideas in fewer words, or split the sentence into two (or more) shorter sentences, or do both. If you decide to reduce the sentence's verbiage, see questions 21-A, 21-F, and 21-G and review §21.2. If you decide to break up the sentence, be sure to avoid the "sing-songy" style described in question 21-I.

**21-I** **Have you rewritten sing-songy sentences?** For example:

> The defendant solicited contributions through an organization with a misleading name. He immediately deposited the funds in a bank account in the Bahamas. Eventually, he used them to buy a vacation home in his own name. This was fraud.

These are four simple sentences, three of them beginning with a subject. The passage sounds naive and probably will bore the reader. The cause is a tendency to write down one thing at a time, without describing the relationships between or among the things mentioned. At its most extreme, the result is a series of simple sentences, all beginning with the subject.

There are two kinds of cure. One is to focus on the relationships, especially causal ones, using some of the transitional words and phrases listed in §21.3:

> Not only did the defendant solicit contributions through an organization with a misleading name, but he immediately deposited the funds in a bank account in the Bahamas. Moreover, he used them to buy a vacation home in his own name. Therefore, he has committed fraud.

The other cure is to vary three things periodically: the types of sentences (some simple, some compound, some complex); the lengths of sentences (some long, some short, some medium); and the way sentences begin (some with the subject, some with a prefatory word or phrase, some with a dependent clause). Closely related material can be combined into fewer sentences, where the sentence structure itself can demonstrate relationships between ideas:

> Having solicited contributions through an organization with a misleading name and deposited them in a Bahamian bank account, the defendant used the funds to buy a vacation home in his own name. This was fraud.

This example uses a subordinate sentence element ("Having solicited . . . bank account") to achieve the desired effect.

You can avoid the sing-songy effect by understanding and using the full range of sentence structures available in English.

**21-J** **Have you avoided the passive voice unless you have a good reason for using it?** In the active voice, the subject of the sentence acts ("*Maguire sued* Schultz"). In the passive voice the subject of the sentence is acted upon ("*Schultz was sued* by Maguire").

The passive voice has three disadvantages. It's often more verbose. It tends to vagueness. And it's usually weaker and more boring to read. Most sentences should be in the active voice.

But the passive may be the more effective voice when you don't know who acted, when you think the identity of the actor is not important, or when you want to deemphasize the actor's identity. For example, compare the following:

> Ms. Blitzstein's aid-to-dependent-family benefits have been wrongfully terminated fourteen times in the last six years.
>
> The Department of Public Welfare has wrongfully terminated Ms. Blitzstein's aid-to-dependent-family benefits fourteen times in the last six years.

Here the passive is actually more concise. Depending on the context, the passive might not be vague because the reader would know that the Department is the only agency capable of terminating aid-to-dependent-family benefits, or at least that the Department is being accused of doing so in this instance.

And, again depending on the context, the passive sentence may be the stronger and more interesting of the two. If the reader is a judge who's being asked to order the Department to stop this nonsense, the passive will be the stronger sentence because it emphasizes the more appealing idea. Generally, a judge is more likely to sympathize with a victim of bureaucratic snafus than to condemn a government agency for viciousness or incompetence.

Sometimes, the passive voice is a good way of avoiding sexist pronouns. See question 21-S.

**21-K** **Have you placed modifiers close to what they modify?** When people talk, modifiers sometimes wander all over sentences, regardless of what they're intended to modify. But formal writing requires more precision. These sentences all mean different things:

> The police are authorized to arrest *only* the person named in the warrant. [*They aren't authorized to arrest anyone else.*]
>
> The police are authorized *only* to arrest the person named in the warrant. [*They aren't authorized to torture or deport him.*]
>
> The police are *only* authorized to arrest the person named in the warrant. [*They have the right to arrest him, but they don't have to. The warrant gives them some discretion.*]
>
> *Only* the police are authorized to arrest the person named in the warrant. [*Civilians aren't authorized.*]

Make sure that the modifier's placement communicates what you really want to say, and don't assume that a busy reader can figure out the meaning from the context.

**21-L** **Have you used parallel constructions when expressing a list?** Even implied lists should be expressed in some sort of consistent structure. Each item or idea must be phrased in the same grammatical format. Consider the following:

> This attorney should be disbarred because of his neglect of a matter entrusted to him, for pleading guilty to the felony of suborning perjury, and because he disclosed a client's confidences without the client's consent.

Here, the first listed item is expressed as a noun possessed by a pronoun ("his neglect"); the second as an unpossessed gerund ("for pleading"); and the third as a dependent clause, complete with subject, verb, and object ("because he disclosed confidences"). Although the first and third items are preceded by the word "because," the second is not. Isolated from the others, each form alone

would be grammatical. But the inconsistencies among them make the whole sentence sound inarticulate. That would not have been true if each item in the list were expressed in the same format:

> This attorney should be disbarred because he neglected a matter entrusted to him, pleaded guilty to the felony of suborning perjury, and disclosed a client's confidences without the client's consent.

**21-M** **Have you used terms of art where appropriate?** Where an idea peculiar to the law is usually expressed through a term of art, that term should be used because it conveys the idea as precisely as the law can manage, and because it often makes long and convoluted explanations unnecessary. Don't write "the plaintiff asked the court to tell the defendants to stop building the highway." It is much more precise to write "the plaintiff moved for an order preliminarily enjoining. . . ."

But don't confuse terms of art with legal argot. A term of art is the law's symbol for an idea that usually cannot be expressed with precision in any other way. Legal argot, on the other hand, has no special meaning peculiar to the law. It's just pretentious wording used for everyday concepts. (See question 21-O.)

**21-N** **Have you edited out inappropriately used terms of art?** Terms of art ought to be used only to convey the precise meaning the law holds for them. Where you use a term of art (perhaps because it sounds lawyer-like) but don't really intend to communicate the idea the term of art stands for, the reader will assume that you don't know what you are talking about.

**21-O** **Have you edited out imitations of lawyer noises?** Said noises found in and about a lawyer's writing have heretofore caused, resulted in, and led to grievous injury with respect to said lawyer's readers, clients, and/or repute, to wit: by compelling the aforesaid readers to suffer confusion and/or consternation at the expense of the aforementioned clients and consequently rendering said repute to become null, void, and nugatory.

Thinking like a lawyer is not the same as imitating lawyer noises like the ones in the preceding paragraph. Expressions like "to wit," "hereinbefore," and "aforesaid" are argot — not terms of art (see question 17-M) — and they do not convey anything that ordinary English cannot communicate more clearly and less awkwardly. The most valuable memos and the most persuasive briefs are written in the real English language. For example:

| | |
|---|---|
| **just fine:** | Elvis has left the building. |
| **bad:** | Elvis has departed from the premises. |
| **worse:** | It would be accurate to say that Elvis has departed from the premises. |

**meaningless:** Elvis has clearly and unequivocably left the building.

**meaningful:** There is uncontroverted evidence that Elvis has left the building.

Why is "clearly and unequivocably" meaningless? Elvis could not unclearly or equivocally leave the building. Either he has, or he hasn't. Writing something like "clearly and unequivocably" pounds the table without adding meaning. But "uncontroverted evidence" is meaningful, because it says that there's evidence that Elvis has left and no evidence that he hasn't. We expect to read in the next sentence about the 27 witnesses who will testify that they saw Elvis go through the stage door, step into a stretch limousine, and disappear into the night.

**21-P** **Have you edited out contractions and other conversational language?** Conversational language — the kind you'd use in a casual email to a friend — doesn't belong in most professional documents.

Professional practice, however, has been evolving on the question of contractions — merging two words with an apostrophe (such as "don't" for "do not"). Contractions do not belong in documents filed in court. But lawyers routinely use contractions in professional email (Chapter 17) and in client letters (Chapter 19). Office memos are a middle ground. Some law firms discourage contractions in office memos. Other firms have no preference one way or the other. (No contractions appeared in the first edition of this book. But because professional practice has been evolving, contractions appear frequently in the edition you're reading now.)

**21-Q** **Have you edited out inappropriate abbreviations?** In formal documents, a lawyer doesn't write "the N.C. Supreme Court has held . . . ." Spell words out unless the abbreviation is generally used at least as often as the full name (for example, "NAACP" and "FCC"). Otherwise, abbreviate only in citations.

**21-R** **Have you avoided rhetorical questions?** Not in legal writing. Your job is to inform, not quiz, your reader.

**21-S** **Have you avoided gender-specific language?** Formal legal writing has traditionally used pronouns that assume a gender binary (he, she) and default to male pronouns. But society is evolving away from this. English has not yet settled into universally accepted gender-neutral pronouns. Our recommendations for how to navigate this issue follow.

When you are writing about a specific person, always use the pronoun that person prefers — whether he, she, they, or something else. The most widely

accepted neutral pronoun is the singular "they."[12] The singular "they" can also be used as a generic, gender-neutral pronoun. Nevertheless, we recognize that in some legal environments, using the singular "they" will be perceived as incorrect.

The best approach is to eliminate the need for a pronoun by writing a different sentence. If that can't be done, recast both the pronoun and its noun in the plural. That might also make the writing more concise, but it can only be done when not referring to a specific person:

| | |
|---|---|
| Gendered pronoun (disfavored) | To calendar a motion, a lawyer must file *his* motion with the clerk. |
| **Pronoun replaced with "the"** | To calendar a motion, a lawyer must file *the* motion with the clerk. |
| **Actor made plural** | To calendar motions, lawyers must file *their* motions with the clerk. |
| **Actor eliminated from sentence** | A motion is calendared by filing it with the clerk. |

If these solutions don't make sense in your sentence, use the singular "they," or alternate male and female pronouns. Try to avoid using pronouns that reinforce stereotypes that do not reflect the world we live in (for example, male pronouns for lawyers, female pronouns for litigants).

Be mindful of nouns that imply a particular gender and try to avoid them. "Congressman" can be easily replaced by "representative," "policeman" with "police officer"; similarly, "fireman" can be replaced with "firefighter." Unless a person's gender is legally relevant, strive to use neutral language wherever possible.

## Exercise
## Kalmar's Driveway

Rewrite the following sentences around nouns and verbs that describe action. Make sure that each sentence is of comprehensible length. Eliminate throat-clearing phrases, and replace nominalizations, unnecessary passives, and unnecessarily wordy constructions. You'll find this easier if you read the whole exercise before starting to rewrite.

1. It is evident that Kalmar is likely to be convicted of accepting a bribe because all the elements of bribery are susceptible of proof beyond a reasonable doubt.
2. A person is guilty of accepting a bribe if that person is an employee of the government and "requests or receives from any other person anything of value,

12. Heidi K. Brown, *Get With the Pronoun*, 17 Leg. Commun. & Rhetoric 1 (2010) (advocating for use of singular "they").

knowing it to be a reward or inducement for an official act," Crim. Code § 702, and a conviction may occur only if evidence is presented by the prosecution that persuades the finder of fact beyond a reasonable doubt that the defendant is guilty.

3. The initial element that can be established is that Kalmar is an employee of the government.
4. The facts indicate that in his capacity as Roads Commissioner, Kalmar had occasion from time to time to purchase, on behalf of the government, quantities of cement, asphalt, and other road construction materials from Phelps, who caused these materials to be delivered to road-repair sites on trucks owned by Phelps.
5. Kalmar had need for a new driveway at his own home, and he made a request to Phelps for a recommendation of a contractor who would do a good job at a reasonable price.
6. Phelps told Kalmar that she would look into the matter, but, without Kalmar's knowledge, a new driveway was built at his home by her employees the next day.
7. The circumstances fit into a pattern showing that Kalmar had knowledge that he was being offered a reward or inducement by Phelps for official acts directly relating to his job, and although the statute does not specify that a defendant must know at the time the thing of value is actually delivered or physically taken that it is a reward for official acts, Kalmar both accepted and continued to receive the bribe when, according to the facts, he did not undertake any effort to compensate Phelps for the cost of the driveway.
8. Because the cost involved is such that it could not have been accidentally overlooked by Kalmar, there can be no innocent explanation for the fact that he had an opportunity every day to see that he had a new driveway for which nothing had been paid, and there is therefore no reasonable doubt about his guilt.

# 22 Quotations

Section 22.1 explains the complex rules on quotation format. Section 22.2 explains how to avoid faults like overquoting, unnecessarily long quotations, and quoting out of context.

## §22.1 Quotation Format

Bluebook rule 5 governs the format of quotations. Here are the most essential requirements:

Use brackets to enclose additions and substitutions that you place inside a quotation, including conversion of a lowercase letter into a capital or vice versa (Bluebook rule 5.2). Use brackets, not parentheses. On your computer keyboard, brackets are at the right end of the row under the numbers.

If you incorporate a quote beginning with a capitalized word into a sentence of your own, the capital letter must be reduced to a lowercase letter unless the capital denotes a proper name. Use brackets to show that you have changed the original. For example:

**wrong:** The court held **that** "**Not** so long ago, in a studio far, far away from the policymakers in Washington, D.C., George Lucas conceived of an imaginary galaxy," but his trademark is not infringed when politicians refer to a proposed missile defense system as Star Wars. *Lucasfilm Ltd. v. High Frontier,* 622 F. Supp. 931, 932, 935 (D.D.C. 1985).

**right:** The court held **that "[n]ot** so long ago, . . ."

Under Bluebook rule 5.3, if you delete words (other than a citation) from a quote, you must indicate that by an ellipsis (". . ."). When the final words of a sentence are omitted, the sentence ends with *four* periods — three for the ellipsis and one to end the sentence. There are two exceptions.

First, where you incorporate a quotation into a sentence of your own composition — as in the "Star Wars" example above — don't place an ellipsis at the beginning or the end of the quotation. Incorporating the quote into your own sentence already suggests that part of it might have been chopped off.

Second, don't place an ellipsis at the beginning of a quotation, even if you intend the quote to stand on its own as a complete sentence. If the quote isn't incorporated into a sentence you have written and if the first letter of the quote wasn't capitalized in the original, capitalize that letter and place it in brackets to indicate an alteration.

If the quotation is 50 words or more, you must put it in a block quote, separated from your text with extra white space above, below, and on the sides. To add extra space above and below, skip an extra line in each place. To add it on the sides, use the indent function in your word processor's *Layout* or *Format* menu.

Don't use quotation marks at the beginning and end of a block quote. The extra white space around the quote tells the reader that you're quoting. And don't put the citation inside the quotation block.

Instead, put the cite in your text, at the beginning of the next line you write. Notice where the cite appears in the two examples below.

**wrong:** The Court held that the government had not proved misbranding or adulteration with a poisonous substance under the Pure Food and Drugs Act of 1906, which Congress had enacted ten years earlier.

> In the present case, the article belongs to a familiar group; it is a syrup. . . . It is produced by melting sugar, the analysis showing that 52.64 per cent of the product is sugar and 42.63 per cent is water. Into the syrup thus formed by boiling the sugar, there are introduced coloring, flavoring, and other ingredients, in order to give the syrup a distinctive character. The caffeine, as has been said, is introduced in the second or third 'melting.' We see no escape from the conclusion that it is an 'added' ingredient within the meaning of the statute. *United States v. Forty Barrels and Twenty Kegs of Coca Cola,* 241 U.S. 265 (1916).

Today the formula might be somewhat different.

**right:** The Court held that the government had not proved misbranding or adulteration with a poisonous substance under the Pure Food and Drugs Act of 1906, which Congress had enacted ten years earlier.

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*United States v. Forty Barrels and Twenty Kegs of Coca Cola,* 241 U.S. 265 (1916). Today the formula might be somewhat different.

## §22.2 How to Test Your Writing for Effective Use of Quotations

While writing — and rewriting — ask yourself the following questions.[1]

**22-A** **Have you quoted and cited every time you use other people's words?** Other people's words must have quotation marks around them and a citation to the source. If you don't do this, you are plagiarizing. See §6.5 in Chapter 6. It doesn't matter whether you do it out of sloppiness or out of an intent to deceive. An idea that you get from a written source must be attributed to that source with a citation, even if you express the idea in your own words. Word of warning here: Current versions of artificial intelligence are *notorious* plagiarizers. Be extremely careful to check anything that you might have used from AI.

**22-B** **Have you quoted only the essential words?** Don't quote unless the quoted words fit into at least one of the following categories:

1. words that must be *interpreted* in order to resolve the issue, such as a statute's key words (see §8.8 in Chapter 8);
2. words that are so closely identified with the topic under discussion that they are *inseparable* from it;

1. When marking up your work, your teacher might refer to these questions by using the number-letter codes that appear next to each question here.

3. words that, *with remarkable economy,* put the reader in touch with the thinking of a court, legislature, or expert in the field; or
4. words that are *the most eloquent and succinct conceivable* expression of an important idea.

Beginning legal writers often overquote because they are insecure about their ability to accurately paraphrase the law. But if you over-quote, you are doing a disservice to your reader, who must now read poorly written or verbose language. In other words, to the extent that it is your job to digest the law for your reader, overquoting abdicates that responsibility. Over-quoting is also often awkward to read. Consider the following:

> The court relied on "[w]ell-established jurisprudence of our sister states . . . holding that baseball is a strenuous game involving danger to . . . players . . . and that one who, with full knowledge of this danger, attends . . . and places himself in a position of danger, assumes the risks inherent in the game." *Gaspard v. Grain Dealers Mut. Ins. Co.,* 131 So. 2d 831, 834 (La. Ct. App. 1961).

Although the writer of the sentence above did some editing, the only words really worth quoting are the ones in quotes below:

> Relying on "[w]ell-established" precedent in other states holding baseball to be a dangerous game, the court concluded that anyone who knows of that danger and nevertheless plays baseball "assumes the risks inherent in the game." *Gaspard v. Grain Dealers Mut. Ins. Co.,* 131 So. 2d 831, 834 (La. Ct. App. 1961).

Which sentence is easier to read and understand — the first one with a big quotation (44 words), or the second one with two short quotes (totaling 9 quoted words)? Which sentence more clearly focuses on the relevant ideas?

The most convincing descriptions of authority are written almost entirely in your own words, with very few and very short quotations that convey the essence of the court's approach.

Block quotations are especially troublesome. Busy readers skim over or refuse to read large quotations because, in their experience, only a few of the quoted words really matter, and it may take too much effort to find them. Readers feel that block quotations are obstacles that have to be climbed over. The more of them you use, the more quickly a reader will decide not to read any of them. Judges and supervising lawyers view large quotations as evidence of a writer's laziness. They believe that your job is to find the essential words, isolate them, and concisely paraphrase the rest. When you throw a big block quotation at a reader, you're asking the reader to do some of your work.

How do you cut a block quotation down to size? Assume that you have written the following in a first draft:

> In *Roth* the Supreme Court held that a government could, without satisfying the traditional clear-and-present-danger test, restrict public distribution of obscene material. But it came to the opposite conclusion when faced with a statute that punished private possession of obscene materials in one's own home:
>
> > It is true that in *Roth* this Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of antisocial conduct or would probably induce its recipients to such conduct. . . . But that case dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, there is always the danger that obscene material might fall into the hands of children . . . or that it might intrude upon the sensibilities or privacy of the general public.
>
> *Stanley v. Georgia,* 394 U.S. 557, 567 (1969). A number of the Court's later right-to-privacy rulings have been based in part on *Stanley.*

First drafts are full of passages like this, and in a first draft they cause no harm. But in later drafts, you should realize that the block quote will repel the reader. Ask yourself, "Why do I want this quote? What words inside it satisfy one or more of the four criteria?"

Your answer might be that no words in the quote satisfy those criteria, but that the quote does contain ideas that you want the reader to know about. If so, *rewrite all of it in your own words*. If you do this well — and it does require effort — your words will be better than the original quote, because your words will *fit* better.

On the other hand, the answer might be that some words are too valuable to give up. Here, "might fall into the hands of children" creates an image that economically reflects the Court's thinking (criterion 3), and "intrude upon the sensibilities or privacy of the general public" sets out a standard that will need to be interpreted (criterion 1). Isolate words like that, and rewrite everything else, condensing in the process. You might come up with something much more readable, like this:

> In *Roth* the Supreme Court held that a government could, without satisfying the traditional clear-and-present-danger test, restrict public distribution of obscene material. But it came to the opposite conclusion when faced with a statute that punished private possession of obscene materials in one's own home. In *Stanley v. Georgia,* 394 U.S. 557 (1969), the Court struck down such a statute and distinguished *Roth* because publicly distributed pornography "might fall into the hands of children" or "intrude upon the sensibilities or privacy of the general public." *Id.* at 567. A number of the court's later right-to-privacy rulings have been based in part on *Stanley.*

This is shorter; it flows better; and it makes the meaning much clearer than the block quote did. The reader's attention is taken straight to the essential words, which stand out when integrated into your own text.

At the opposite extreme is the problem of too many short quotations rather than quotations that are too long, although the effect on the reader is similar. This is called snippetizing, and it might take the form of a quote from and cite to case A, followed by a quote from and cite to case B, followed by a quote from and cite to case C, and so on, without much discussion of any of the cases or of the ideas expressed in the quotes. Strings of snippet quotations give the reader a feeling of sliding over the surface of complex ideas, which the writer refuses to explain. Explain the cases.

A writer who quotes too much is sometimes called a "cut-and-paste artist" because the product is not really writing at all. Little thought goes into it, and readers have no confidence in it. What they want is *your* analysis, which comes only with hard mental work — not finding quotable words and typing them into your document.

**22-C** **Have you avoided quoting out of context?** Sometimes words mean something different in context than they do when quoted out of context. Assume that a reader will check the source from which you quote. Readers often do that to learn more or to make sure that your reasoning is correct. Suppose a reader understands the words, as you have quoted them, to mean one thing, but, when checking your source, the reader discovers that in context they mean something completely different. Not only have you done the reader a disservice, but now the reader distrusts you.

**22-D** **Have you quoted accurately?** Suppose you see language in a case that you want to quote. The safest thing to do is cut and paste — Lexis and Westlaw even allow you to do this with citations. This ensures you have quoted accurately. If you prefer to take notes when you read or retype material yourself, just be sure to go back and make sure you reproduced the quote accurately. Making an error in quotation is not just sloppy — it misinforms the reader and that can be a big mistake. You don't want to attest that a court said something it didn't say.

**22-E** **Have you placed quotation marks exactly where they belong?** The most common problems are (1) omitting the quotation marks that close a quotation, even though the opening quotation marks are included ("Where does the quote end?" writes the teacher in the margin); (2) omitting the quotation marks that open a quotation, even though the closing marks are present ("Where does the quote begin?" asks the teacher); and (3) where there's a quote within a quote, forgetting to change the double quotation marks of the original to single marks.

## Exercise
## The First Amendment

1. You are in the midst of writing a memorandum involving the right-of-assembly clause — and no other part of the First Amendment. You intend to quote the words to be interpreted. This is the text of the entire amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Using words from the Amendment, complete the following sentence: "The First Amendment provides . . ."

2. Do the same for a memorandum involving the freedom-of-speech clause.

# THE SHIFT TO PERSUASION

# 23 Introduction to Motions and Appeals

## §23.1 Introduction to Persuasion Through Motions and Appeals

As a lawyer, you will use legal persuasion to convince judges to make decisions that favor your clients. You will do this primarily through motions and appeals, procedures that allow you to put a request before the court and get an answer. While motions and appeals often have an oral component, the lion's share of legal persuasion takes place in writing. Whether you are writing a motion memorandum or an appellate brief, the ability to persuade centers on three skills: developing a persuasive theory (Chapter 24), telling the client's story (Chapter 25), and developing persuasive arguments (Chapter 26). This chapter will provide a general overview of how motions and appeals work.

### §23.1.1 What Happens During a Motion

A motion is the mechanism lawyers use to ask the court to take an action. The party making the motions requests the court to issue an order. An order is the court's command that something happen, such as requiring the opposing party to comply with a discovery request. The court can also issue a judgment ending the case, such as by granting a motion for summary judgment. The party making the request "moves," or files a motion, and the other party can oppose the motion.

Motions can be filed at any stage of litigation after a complaint has been filed, both at the trial court and during appeal. You can file a motion to request something small, like extending a deadline, to something big, like getting an entire case dismissed. Some motions are controlled by laws like the Rules of Evidence or the Rules of Civil Procedure, and others are completely within

the court's discretion. You might file many different motions in the process of litigating one law suit. Chapter 27 identifies many of those motions.

Some motions are made orally, by asking a judge in open court. The vast majority, however, are made in writing, by filing the request with the court. The party requesting the motion can file an accompanying memorandum of law in support of the motion, and the opposing party can file a memorandum of law in opposition to the motion. In some courts, these are called briefs. Every court has local rules governing what form the motion and briefs should take, and identifying exactly what needs to be filed, so you should always check the local rules when preparing a motion. Chapter 28 describes writing for motions in more detail.

After the motion is filed and the opposition has responded, the judge might hold a hearing if more evidence is needed, or an oral argument to hear more directly from the lawyers. You can request an oral argument if you think it will help to present your argument directly to the judge and answer questions, but in most courts, the judge is not obligated to grant your request. As a result, many motions are decided based only on the written documents, which is why it is so important for them to be well written and persuasive.

The judge grants or denies the motion and issues an order identifying what should happen next. This also varies by local practice, but most orders are proposed by the parties as a part of filing the motion. Occasionally the judge will write a judicial opinion explaining the reason for the decision, but much of the time the judge just issues the order and the case proceeds according to the outcome of the motion.

### §23.1.2 What Happens During an Appeal

In an appeal, you ask an appellate court to affirm or reverse the outcome of a decision by the trial court. For the most part, you can only appeal decisions that resolve an entire case or fundamentally affect the outcome. For example, orders on motions to compel discovery or exclude evidence cannot be appealed until the trial is over. A *judgment* — or in equity, a *decree* — is a decision that terminates a lawsuit and decides the parties' rights and obligations. The judgment might award damages or grant an injunction, for example. A jury verdict also resolves the parties' rights and obligations in a case. Judgments and some but not all orders can be appealed.

The primary job of appellate courts is to correct errors made in the trial court, but appellate courts also create precedent clarifying existing law and, in cases of first impression, making new law. In jurisdictions with a two-tiered appellate court system, the intermediate appellate court focuses primarily on error correction, while the highest appellate courts mainly focus on making and clarifying law.

In an intermediate appellate court, appeals are typically decided by smaller panels of judges, rather than all of the judges in that court. For example, U.S. Courts of Appeals decisions are made by panels of three judges. In rare cases, a party that has lost before a panel may persuade the full court en banc to review the panel's decision. In the U.S. Supreme Court and in the highest court of every state, all the justices meet together to hear and decide appeals.

Appellate practice varies from court to court and depends on the jurisdiction's rules of appellate procedure, but these are the significant steps in most appeals:

First, the party seeking the appeal (called the *appellant* or *petitioner*) files whatever document is required by law to begin the appeal. In some courts, the appellant can appeal "as of right," which means the court must hear the appeal if the losing party has filed the appropriate documentation in a timely manner. In these jurisdictions, the document is a simple notice of appeal, declaring that the losing party is pursuing its right to have the case reviewed. Other courts, such as U.S. Supreme Court, have the discretion to refuse to hear an appeal. In that situation, the appellant must petition and file a brief, arguing to the court that there are important reasons to correct the error below or clarify important matters of law and policy.

Once the appeal is underway, the record (all the documents and evidence presented at the trial court) must be transmitted from the court below to the court above. This can be simple and speedy, if the record is electronic or where the appeal is from an order issued in the early stages of litigation, such as a motion to dismiss a complaint. Most appeals, however, arise after more extensive litigation. In those cases, the preparation and transmittal of the record can delay matters for months and add great expense to the cost of the appeal, especially in many state jurisdictions that do not maintain electronic records.

In addition to the full record, some courts require the parties to compile an abbreviated version of the record called the *joint appendix* or the *record appendix.* Because the full record can be so extensive, the joint appendix allows the judges to more easily locate the record facts that are most relevant for resolving the case. In jurisdictions without electronic records, the full record can consist of multiple volumes and be extremely cumbersome.

The next step is drafting the briefs. If you are the appellant/petitioner, you file the opening brief, setting out the arguments that lead to a result in your client's favor. If you are the appellee/respondent, you file a response, presenting the arguments for why the court should leave the lower court decision in place. The appellant can file a reply.[1] In novel cases or cases that present an issue of jurisprudential significance, the court may allow other parties, known as amici, to file briefs arguing in support of one party or the other. Each of

1. In most law school classes, both sides will turn in their briefs at the same time because the structure of the school year does not leave time for back and forth filing.

these briefs is an opportunity for persuasive writing. Chapters 29-31 explain appellate brief writing.

Once all the briefs have been filed, you may have an oral argument. As with motions, many appeals are decided based exclusively on the briefs. When a court holds oral argument, each lawyer has the opportunity to present their arguments and answer the judges' questions. Oral argument is the lawyer's only chance to converse with the judges about the problems and issues raised by the appeal. For more on oral argument, see Chapter 32.

After oral argument, the judges confer and discuss the merits of the appeal. One judge is selected to write the court's opinion. In some courts, the assignment is made by chance rotation, but in others it is made by the presiding judge. In the U.S. Supreme Court, the assignment is made by the most senior judge among the majority. The assigned judge drafts an opinion and circulates it to the other judges, who might suggest changes or might draft and circulate concurring or dissenting opinions of their own. In routine appeals, the draft majority opinion is often quickly approved, and concurrences and dissents may be held to a minimum. But in more complex cases, views can change, and an opinion originally written as a dissent might be transformed into the court's opinion, while the original majority draft is converted into a dissent.

## §23.2 The Roles of the Brief and of Oral Argument

The brief and oral argument each play important, yet different roles in persuading a court to rule on a motion or appeal.

Because many cases are decided based on the briefs, what you write can play a critical role in influencing the judge's decision. In a brief, you can tell the client's story and make the client's arguments in detail. You can present complex legal analysis with detailed citation to authority. A successful brief not only persuades the judge that your client should win, but it can also be used as a manual, explaining to the judge exactly how to make the decision and how to justify it in an opinion. A judge may use the brief to prepare for oral argument, to prepare for the conference with other judges, to come to a decision about the case, and to write the opinion.

Oral argument is not the place to present detailed legal analysis, but it can do two things better than a brief can. First, in oral argument you can more immediately motivate the court by focusing on the most important ideas — the few facts, rules, and policies — that make your case compelling. Second, in oral argument you can try to discover, through the court's questions, each judge's doubts. And you can explain on the spot exactly why those doubts shouldn't prevent a ruling in your favor. Oral argument, in fact, is your only opportunity to learn directly from the judges the problems they have with your arguments. But oral argument also has a significant disadvantage. Oral argument lasts only

a few minutes, and memories of it can fade. The brief, on the other hand, has permanence. It's always among the judges' working materials, and it "speaks from the time it is filed and continues through oral argument, conference, and opinion writing."[2]

Detail is communicated best in writing, which a judge can study. But the spontaneity of conversation encourages dialogue and lends itself to the broad sweep of underlying ideas.

## §23.3 How Judges Read Briefs

How does a judge read a brief? The answer may vary considerably from judge to judge, but the following is typical:

> Usually I first read both parties' statements of the questions presented; then I read the appellant's statement of the general nature of the controversy. Then I look at his outline of argument to see what points he makes. Then I look at the appellee's outline of argument to see what he is going to do in reply. Then I go to the joint appendix to see what the trial court or the administrative agency did. Then I read the appellant's statement of the facts and the appellee's statement. Thereafter I examine the two briefs one point at a time, first the appellant's and then the appellee's, on the first point; then both briefs on the second point, etc. If the point is an obvious one, or if one side or the other seems to be wholly without strength on it, I do not spend too much time on that point in my first study. On the really contested points I study both sides, read the cases, and, if facts are critical check the record references. The briefs on the critical points are often reread and reread.[3]

Other judges might read the parts of a brief in a different sequence — perhaps reading the point headings before anything else — and a given judge might vary the sequence from case to case.

As a backdrop, consider how busy most judges are. Depending on the court, over the course of a month, an appellate judge might hear oral arguments and confer with colleagues on several dozen appeals, and trial court judges may be overseeing cases in the hundreds. For each motion or appeal, the judge will have to read at least two briefs and in multiparty cases, a half-dozen briefs or more, together with portions of the record. Trial court judges must issue orders and, where necessary, draft opinions on their own (or with the help of the clerks who work for them). Appellate court judges will have to write opinions in a proportion of the appeals before the court. On a five-judge court, for

2. Herbert Funk Goodrich, "A Case on Appeal — A Judge's View," in *A Case on Appeal* 10-1 (1967).
3. E. Barrett Prettyman, *Some Observations Concerning Appellate Advocacy,* 39 Va. L. Rev. 285, 296 (1953).

example, each judge is assigned one-fifth of the majority opinions. In addition, the judges may also write concurring or dissenting opinions in additional cases.

Appellate judges will also have to read opinions drafted by other judges and at times will write memoranda to colleagues suggesting changes in those opinions. And trial and appellate judges will spend a fair amount of time reading some of the authorities which are cited in all these briefs and draft opinions. With all this work, the typical judge would find it a luxury to spend as much as an hour reading the average brief. The time available is often no more than half an hour per brief. That's why briefs must be carefully written to persuade while demanding the least possible time and effort from the reader. Judges spend more time on briefs where the appeal raises deeply troubling issues than on briefs in more routine cases. And a judge who writes an opinion might read the briefs more thoroughly than one who does not.

The following considerations about your audience and their approach to reading should guide you:

First, your brief will likely be read by multiple readers. Most judges have law clerks or research attorneys who assist judges by studying the briefs and conducting independent legal research. They will read your brief and make recommendations to the judge. In appellate courts, all of the judges deciding the case will read your brief — that could be a panel of three or an en banc court of more than twenty. Opposing counsel will also read your brief and develop arguments in response, as you will with theirs.

Second, a brief is read for specific purposes. Whether judge or clerk or opposing counsel, they are reading to learn about the case and make decisions. Judges may read to prepare for oral argument, and again afterward to decide how to vote. A judge will reread various portions of the brief several times while writing the opinion, looking for the detail needed to justify and explain the decision. And all along the way, the judges will be assisted by law clerks who check up on the details of the brief while the judges focus on the broader principles. Each segment of the brief must be written to satisfy all of these purposes.

Third, briefs — like memos — aren't read from beginning to end at a single sitting. They're read in chunks, at different times, depending on the needs of the reader. (You probably read an appliance or automobile owner's manual in pretty much the same way, and a brief is a manual for making a decision.)

Finally, a brief must be easy to navigate. A judge will go first to a part of the brief that reveals the fundamental issues and your theory on each issue. A judge ought to be able to find that material plainly set out in multiple places. In an appellate brief, for example, those places are: the point headings and subheadings (collected in the Table of Contents); the Introduction or Questions Presented; the Summary of Argument; and the Statement of the Case. In a motion brief, it might be the Preliminary Statement or Introduction; the

Statement of Facts; and the point headings. Each judge has a favorite starting place. Not only do you have no way of knowing when you write the brief where a given judge prefers to begin, but you're writing for several judges and must accommodate them all. Thus, you must draft these components so that each can separately be a self-sufficient and self-explanatory entry point for any reader.

# 24 Developing a Persuasive Theory of the Case

## 24.1 Strategic Thinking

> Luck is the residue of design.
>
> — *Branch Rickey*

Every aspect of persuasive legal writing should be the result of a deliberate choice. You should have, and be able to articulate, good reasons for the decisions you make in your writing. That includes decisions about structure (What arguments or facts should I begin with?), vocabulary (What should I call the key people and things?), and space (How much space should I devote to particular facts or arguments?). Making these decisions requires careful thought and planning. For each choice you make, ask yourself how it will help you win your case.

In post-mortems of your work, a supervising lawyer or a teacher might ask you a litany of questions about strategy. You should ask yourself these questions *before* your supervisor does:

What was your goal?
What was your strategy?
What other possible strategies did you consider and reject?
For each rejected strategy, why was it inferior to the one you did choose?
What led you to believe that the strategy you chose would actually achieve the ultimate goal?
Did you do all the things necessary to execute the strategy you chose?

## §24.2 Theories: Of the Case, of the Motion, of the Appeal

The first step in articulating a goal and planning a strategy is to figure out what your *theory of the case* is.

The theory of the case combines the relevant law and the key facts, and gives an overarching rationale for why you will win. It is the essence of your case. One commentator describes it as a "succinct, general description of your version of what happened and why," coupled with a "characterization that paints your client in a positive light."[1] A good theory has logical and emotional appeal; it is "persuasive both to the mind and to the heart."[2]

Persuading is selling, and judges have accurately been described as "professional buyers of ideas."[3] You are selling your theory to the judge with your brief (and in your oral argument, if you have one).

On appeal, the theory of the case may be referred to as *theory of the appeal.* On motion, it may be referred to as *theory of the motion*. Although these terms refer to a similar concept, lawyers do consider the level of court and procedural posture when crafting their theories.

Specifically, when crafting a theory, lawyers consider that a trial court is a place of routine, and trial judges (generally) are not in a position to make grand changes in the law. Trial judges do not like to be overturned by appellate courts, and they try to make decisions that will avoid that result. While trial judges certainly consider policy, they are likely to respond positively to a theory that shows how the case outcome conforms to existing law in their jurisdiction.

Appellate judges, on the other hand, are conscious of their responsibility to see the bigger picture because they are making law for an entire circuit (in the federal realm), or the entire state. The rules they announce thus must apply to a wide range of factual circumstances. This is especially true in cases of first impression, where little or no mandatory law exists. Appellate courts are also mindful of precedent, but are equally concerned with the broader social implications of the law.

## §24.3 Developing a Theory: Be Open to Possibilities

When Savana Redding approached lawyers in the case of *Safford v. Redding*[4] and told them that her school had strip-searched her to look for drugs, a lawyer

1. Albert J. Moore, Paul Bergman & David A. Binder, Trial Advocacy: Inferences, Arguments & Techniques 95-96 (1996).
2. David Binder & Paul Bergman, *Fact Investigation: From Hypothesis to Proof,* 140, 184 (West 1984).
3. Girvan Peck, *Strategy of the Brief,* Litigation, Winter 1984, at 26, 27.
4. *Safford Unified Sch. Dist. v. Redding,* 557 U.S. 364 (2009).

who lacked the skill of theory design might have said, "I'm sorry, Savana, but public school students have limited rights under the Constitution, and school districts have broad latitude. I'm afraid you are unlikely to prevail in a lawsuit."

But Savana's actual lawyers were very skilled, and they brainstormed. Was this really a case analogous to the search of a student's backpack (which was the major Supreme Court case on this issue)? Might the law draw a different line when a body search is at issue? Were drugs even found? What kind of drugs were at issue?

Notice the technique. First, think about fairness and justice. The law isn't always fair and just, and it doesn't always help people who have been hurt. But, as lawyers, we can explore whether any possibility exists to right a wrong. So, explore the possibilities. Be open to your emotions here. If it doesn't seem fair, maybe there is a legal argument there. Second, open doors to additional factual possibilities. Ask the questions. Third, find out how the law treats those possibilities. You shouldn't let your feelings about fairness outweigh your reading of the law, but your feelings should inform how you approach the law.

## §24.4 Developing a Theory: Process

Legal research and a solid understanding of your factual record guides the growth of your theory. At the same time, your theory also guides the course of the research. That circular process of crafting a theory, looking carefully at your record and researching the law, brainstorming a theory, researching more, and then reevaluating a theory is a critical lawyering skill. Your first version of your theory of the case may be quite rudimentary, and may develop or change as you learn more about the law.

**Ask what the case is really about.** Finish this sentence: "This is a case about . . .". Is it a case about a broken promise? An overzealous school principal? A rogue FBI agent who ignores the protections of the Constitution? What do you see as the human conflict in the case?

**Ask what will matter to the court.** The human conflict is, of course, not the end of your inquiry. You must think about the legal issues. The law doesn't right all wrongs. Certain kinds of suffering — for good reasons or bad — have no effect whatsoever on the typical judge. Do research to see what is significant to a legal audience.

**Make a list of your strengths and weaknesses.** Taking into account what you know about the law, what are your best facts? You might want to review the chapter on persuasive facts (Chapter 25). What facts that favor your client's position are both legally relevant and have a high emotional appeal?

Those are your best facts. What are your worst facts? (Your worst facts are usually the best facts for the other side.)

**Consider your opponent's likely theory.** Finally, it can help to develop your adversary's most likely theory while creating your own. If you look at the case as your adversary will see it, and if you hypothetically work up a theory that your adversary might argue, you'll be able to identify the weaknesses in your theory. Otherwise, you will look at the controversy one-sidedly, and your theories will reflect wishful thinking and be too unidimensional to withstand attack.

**Articulate a very short story or headline.** Using what you have learned about the law, your best facts, your worst facts, and the human elements of the case, what is the best story you can tell? This story should be short: a headline, a tweet, or a "six-word story."[5]

Look at these two Questions Presented from the *Safford v. Redding* case. Can you tell what the litigants' theories of the case are? Try to formulate theories for both sides. Then look at the list of possible theories of the case. Notice how theories of the case can vary significantly.

| **School District:** | **Savana:** |
|---|---|
| Whether the Fourth Amendment prohibits public school officials from conducting a search of a student suspected of possessing and distributing drugs on campus in violation of school policy. | Whether it is reasonable to subject a 13-year-old girl to the indignity of a strip search based on an unreliable accusation that she previously possessed ibuprofen, and no information that she did in fact possess ibuprofen in her undergarments, at the time of the search. |

**Possible Theories for the School District:**

1. The health and safety of all middle school students must outweigh the privacy interests of one.
2. School officials must be able to safeguard students by searching students who might be distributing drugs to other students.
3. It was reasonable to search the student because the school had evidence she was going to sell dangerous drugs to other students.

5. Legend has it that Ernest Hemingway was asked to write a story in six words and he wrote the following: "For Sale: baby shoes, never worn." This legend has spawned collections of six-word stories. See https://www.npr.org/templates/story/story.php?storyId=123289019.

**Possible Theories for Savana:**

1. A strip search of a minor for a legal, common painkiller is way beyond what is acceptable in our society.
2. The Fourth Amendment is a safeguard against overzealous school officials who would strip a 13-year-old girl to search for a legal drug.
3. The School District had no evidence to justify such an invasive, harmful search of a young girl.

## §24.5 How to Evaluate Your Theory

To figure out whether your theory stands a significant chance of persuading a court, ask yourself the following questions.

**24-A** **Does your theory present a positive, assertive account of why your client should win?**

**24-B** **Does your theory have a solid basis in fact?** Make sure your theory is fully supported by your facts and isn't marred by hyperbole or bias.

**24-C** **Does your theory have a solid basis in law?** Are your interpretations of the statutes and cases reasonable? When a court examines your legal arguments, will it be persuaded?

**24-D** **Does your theory pass the "straight-face" test?** In other words, is it plausible? Would you be comfortable stating it to a judge's face in chambers during a pretrial meeting or during oral argument? All else being equal, a simple theory is more down-to-earth than a complex one. The most easily sold theories are those that are based on easily believable interpretations of the evidence and the authorities; that would lead to reasonable results; that don't ask a judge or jury to believe that people have behaved in improbable ways; and that ask for narrow decisions, rather than earth-shaking ones. (A judge would much rather find that your client is not guilty on the facts than hold that the statute defining the crime is unconstitutional.)

**24-F** **Does your theory "[e]xplain why people acted in the way they did"?**[6] A theory is effective when it rings true for the reader. If a theory assumes that the actors behave differently than a reader would expect in that situation, the theory isn't persuasive unless it includes a compelling rea-

6. David M. Malone & Peter T. Hoffman, *The Effective Deposition* 53 (2d ed., 1996).

son for the difference. Theories that impute deceit to otherwise objective witnesses, for example, are less attractive than those that suggest honest mistakes.

**24-E** **Does your theory account for unfavorable facts?** Your theory should be a positive assertion about why your client prevails. It also must be broad enough to explain the evidence against your case. All the School District theories of the case noted above, for example, are some version of "we had to keep students safe," or "we had to stop her from dealing drugs." Note that the School District theories do not *highlight* the strip search, because that is a very bad fact for them, but when confronted by that fact, their theory still holds: Student health and safety trumps a single student's right to privacy.

## Exercise
## Escape from Prison? (Developing a Theory)

Orville Bradwyn is charged with the crime of escape from prison. The state's sole witness was Benjamin Tunmeyer, a prison guard, who testified as follows.

*Q:* Please tell the court what you observed and did at 6:30 in the evening on the sixth of July.
*A:* I was checking prisoners in the dinner line. Prisoners are required to be in there at that time, and any prisoner who hasn't shown up for dinner is considered missing. The defendant didn't appear. I then checked his cell. Some material had been put in his bed, bunched up so that it looked like somebody was asleep there. His radio had been left on. But he was gone.
*Q:* What did you do?
*A:* We searched the grounds outside the prison. We didn't find the defendant there, so we searched inside the prison — first the perimeter, and then the inside of buildings and containers where someone might hide. We finally found him in the laundry room at 7:39 PM.
*Q:* What did he have with him?
*A:* All of his clothing.
*Q:* Does the prison wash the laundry of any other institution?
*A:* Yes, we do the laundry for the state hospital down the road. It's done in the same laundry room where we found the defendant.
*Q:* How is the hospital's laundry transported to and from the prison?
*A:* By truck. The hospital's truck brings it in the morning and picks it up at about 8 PM.
*Q:* Are prisoners permitted in the laundry room in the evening?
*A:* No prisoner is allowed in that room after 5 PM. Hiding in one of the hospital's laundry bags is an obvious way to escape from the prison.
*Q:* What precautions are taken to prevent that?

*A:* At 5 PM, a guard makes sure all prisoners assigned to work in the laundry have left, and then the door is locked. In addition, the guard opens up each laundry bag that goes to the state hospital and makes sure it has only laundry in it. Then he locks up the room and locks another door on the corridor leading to the laundry room. Nobody is inside those doors until the hospital's truck arrives about three hours later.

*Q:* What guard was assigned that responsibility on the night in question?

*A:* Me. I sent out all the prisoners and satisfactorily inspected the state hospital's bags. Then, I locked the doors and left.

*Q:* Was Mr. Bradwyn assigned to work in the laundry?

*A:* Yes. But he was not scheduled to work in the laundry room on the day in question.

Cross-examination:

*Q:* Are you familiar with Mr. Bradwyn's reputation among other prisoners and among corrections officers?

*A:* He is an exceptionally tidy person.

*Q:* Were there any prior occasions on which you and Mr. Bradwyn had shouting matches?

*A:* Yes. It's almost impossible to inspect his cell. He starts yelling the minute you touch any of his things. He says he doesn't like them moved.

*Q:* What was the defendant doing when you found him?

*A:* He was washing his clothes. No, actually, he was drying them. They were in the dryer.

*Q:* What items of clothing were in the dryer?

*A:* Both of his prison uniforms — prisoners are issued two — and socks, undershirts, and undershorts. They were still wet.

*Q:* What did you find when you searched Mr. Bradwyn's cell?

*A:* Letters from his family, personal photographs, letters from his lawyer, an address book.

*Q:* Before dinner, prisoners are free to move about outside their cells, aren't they?

*A:* Yes.

*Q:* And the same is true after dinner, isn't it?

*A:* Until 7:30.

After this testimony, the prosecution rested. Before any defense witnesses testified, Bradwyn moved to dismiss on the ground that the prosecution had presented insufficient evidence to convict.

Develop two theories that satisfy the criteria in §24.7. One theory should support Bradwyn and his motion. The other should support the prosecution and oppose the motion. Use the method outlined in this chapter.

The relevant statute and cases interpreting it appear below:

### CRIMINAL CODE § 745

If any person committed to prison shall break and escape therefrom or shall escape or leave without authority any building, camp, or any place whatsoever in which he is placed or to which he is directed to go or in which he is allowed to be, he shall be deemed guilty of an escape and shall be punished by imprisonment for a term not to exceed five years, to commence immediately upon the expiration of the term of his previous sentence.

### STATE v. HORSTMAN

The crime of escape is established by proof that the defendant was confined in a prison and escaped from such confinement or departed without authority from a place to which she or he was duly assigned. Unauthorized departure is the gravamen of the offense.

### STATE v. CAHILL

While incarcerated, the defendant was placed in solitary confinement for fighting with another prisoner. A guard inadvertently left the cell door unlocked. The defendant got out and was apprehended on top of the prison wall.

The defendant argues that the evidence does not prove that he committed the crime of escape because there is no evidence that he escaped from the custody of the Department of Prisons. He argues that, at most, he is guilty of the lesser crime of attempted escape.

The crime of escape was complete, however, when the defendant got out of his cell. The crime can be committed without leaving the prison as a whole. It is enough that the defendant left a place where he was confined within the prison.

### STATE v. LIGGETT

The defendant was incarcerated and assigned to work in the prison shop manufacturing auto license plates. On the day in question, the defendant was reported absent from his shift in the license plate shop. After a prolonged search, he was found inside a machine in the prison cannery with a pillow, reading a novel.

The evidence does not prove beyond a reasonable doubt that the defendant committed the crime of escape. He failed to report for work in one part of the prison, and, without authorization, spent the time in another part. That might violate prison rules and merit internal prison discipline, but it is not the crime of escape.

# Telling Your Client's Story in a Statement of the Case (or Facts)

> [M]ost contentions of law are won or lost on the facts.
>
> —*Justice Robert Jackson*, Associate Justice, U.S. Supreme Court

How you present the facts of your client's case is critically important. People think in story form, and we remember stories vividly. Think of how much easier it is to remember a legal case with vivid facts as opposed to sections of the Tax Code. Many lawyers will tell you that they would rather have bad law than bad facts. Bad law we can get around—but bad facts tend to stick. This chapter explains how to tell your client's story in a persuasive way, highlighting the good facts and minimizing the bad.

The first thing to keep in mind is that presenting your client's facts is about telling a story. Your fact statement should be clear and well written, but it should also have a clear emotional, intuitive appeal. It should meet three basic goals: (1) to motivate the judge to act in your favor; (2) to communicate your fundamental facts, including who the parties in conflict are, so that you can apprise the judge of the basic issue; and (3) to highlight favorable facts and neutralize unfavorable ones.

Before reading this chapter, you might want to first review Chapter 10 on fact analysis, and peruse the Statements of Facts in the Appendix F motion memo and the Statements of the Case in the Appendices G and H appellate briefs.

## §25.1 The Basics

Fact statements in briefs have different names in different courts. In the U.S. Supreme Court and the Federal Courts of Appeals, the fact section of the brief is called the *Statement of the Case*. *Statement of Facts* is also a commonly used name, especially in trial courts (see Appendix F motion memo).

Your first step is to read your *record*. The legal record is the definitive compilation of the evidence in a case.

One of the first things a lawyer does when starting to write a brief is to read the record carefully and make a timeline of the facts, identifying what happened and when. Once you have the basic outline of what happened, you can begin to analyze which facts are good for the client — and which are bad. These are the building blocks for the story.

For the most part, every statement you make in your statement of facts must have a citation to the record. With rare exceptions, if something is not in your record, it generally cannot be included, even if your client swears to you that it is true. In other words, if it isn't in the record, for your purposes (and the court's), it doesn't exist as a fact.

If a fact appears in your Argument, it should be in your facts. Period.

Your Statement of Facts should be only facts — no legal argument or inferences. "Joe ran a red light" is a fact (if it is in your record). "Joe drove carelessly" is an inference. "Joe was negligent" is a legal argument. Only facts that are drawn from the record belong in the facts. Everything else goes in the Argument. The only exceptions to this are inferences that witnesses drew, which, if they are in the record testimony, are facts. You can also state inferences that your adversary won't contest.

The absence of a fact from the record can itself be a fact. You can say things like "Nothing in the record shows that . . ." or "No witnesses identified the defendant."

## §25.2 The Basic Tools of Persuasive Storytelling

If you cannot argue or make inferences in your statement of facts, how will you persuade? To begin, consider three basic building blocks of persuasion: structure (in what order to present things), space (how much space to devote), and language (what to call things). In your facts statement, you will state your facts in a carefully chosen order, using deliberately chosen language, and devoting the most space to your good facts and the least to your bad ones.

Once you have your timeline and you've done some legal research so that you know which facts the law considers relevant, begin to assess your facts as good or bad for your client's position. It is helpful to have a working *theory of the case* (Chapter 24) at this point, though you may revise it after evaluating your facts more closely.

In evaluating your facts, consider both *legal relevance* and *emotional power*. A *legally relevant* fact is one that has the potential to change the legal outcome

of a case; some lawyers refer to these facts as *outcome determinative*. If the fact were not present, or were the opposite, the legal outcome would be different. *Emotional power* refers to the intuitive, emotional pull of a fact. Some facts are legally relevant, but don't have much emotional pull, like the date a contract was signed or the name of the manufacturer of a faulty airbag.

The most important facts, and the ones around which you likely based your theory of the case, are usually those with high legal relevance and high emotional power. The good facts that have the highest relevance and emotional power are the ones you will emphasize. The bad facts that have the highest relevance and emotional power are those you have to think carefully about how to handle.

## §25.3 The Opening

Your reader should know immediately who your client is when she reads the very first sentence of your facts. Think about where your story should start. Most students default to chronological order, but this is not always the most persuasive use of structure. Consider your theory of the case and what event is most important to your theory, and start there. For example, in a case about criminal assault in a bar, the prosecution might begin the story with the first punch the defendant threw at the victim, or even the victim's medical treatment (how many staples, loss of blood). The defense, on the other hand, might go back in time to when the victim entered the bar and started drinking—or choose to begin with what the victim said to the defendant before the fight began.

Often, lawyers begin the facts with a short, theory-heavy "preamble" that introduces the case and tells the judge why the case is before the court. The preamble, like the theory of the case, finishes the statement "This case is about . . ." Skilled legal advocates, however avoid that hackneyed phrase. Consider this opening from *Ricci v. DeStefano*, a case about an affirmative action policy by the City of New Haven:

> In 2003, New Haven sought to fill command vacancies in its fire department. Petitioners qualified for promotion under a race-blind, merit-selection process mandated by local law but were denied the positions by the city because of their race and racial disparities in the examinations' outcome. City officials refused to promote the successful candidates and left the vacancies unfilled, intending to repeat the competition with the aim of awarding a higher proportion of the promotions to minority candidates. [Footnote omitted.]

There can be no question which side wrote this opening. That is so even though the paragraph contains only facts—few adjectives and adverbs, no overstatement, just facts. Notice the juxtaposition of "qualified for promotion . . . based on a merit-selection process mandated by local law" and "refused to promote" and "left the vacancies unfilled." Petitioners' theory of the case is loud and clear: they were qualified, but were denied the positions based on their race. The

opening simultaneously apprises the court of the overarching impetus of the lawsuit and persuades the court of the rightness of Petitioners' position.

## §25.4 Tips for Effective Storytelling

**Using Structure.** Put good facts at points of emphasis. Most readers notice information that occurs at the beginning of a point of emphasis and remember things that are stated last. That means that your good facts should be at the beginning and end of: your statement (macro organization), headings (if you use them), and your paragraphs (micro organization).

**Using Space.** The majority of space in your statement should be good facts. Unpack the details of your good facts so that your reader has a rich, thick description of the good facts. Overuse of adjectives and adverbs is a common novice error in the statement of facts. These words are not descriptive — they tell, as opposed to show. They also compress facts instead of expanding them. Consider the following example:

| **Telling (adjectives and adverbs in bold):** | **Showing (better):** |
|---|---|
| Defendant paid a strongman to **violently terrorize** the family of the man who owed him money. Defendant knew that the man would use **unsavory** collection practices. | Over a period of several months, defendant met with Robbie Mutch, a man with several convictions for arson and assault. Mutch had approached defendant and offered to "go after" Jessup, who owed defendant money. Over the course of these meetings, defendant agreed to "hire" Mutch to get his money back. Mutch then followed Jessup until he was alone and broke his arm with a pipe, saying "it's time to pay." When this did not immediately work, he also went to the school attended by Jessup's children, two girls ages 7 and 9, and gave the girls "notes" to pass on to their father. The notes said things like "look how easy it was to get to your kids" and "next time you'll pry this note from her beaten body." Mutch told defendant that he was going to do these things, and defendant paid him to do them. |

The adverbs and adjectives in the "telling" example do not help the court understand what happened. They are the writer's editorializing. If you asked ten lawyers what "unsavory" practices are, you would get ten answers. Moreover, "violently terrorize" is a loaded term that can encompass a wide range of behavior. Instead, *show* the court what happened, and let the court make the value judgments.

The "showing" example is much more memorable than the "telling" one. When you are done with a first draft of your facts, consider reviewing them to check for adverbs and adjectives. Did you overuse them? Are there places where you could substitute detail for an adjective or adverb to better effect?

Another good way to check your facts for persuasiveness is to count sentences. How many sentences are good facts? How many are bad? In most cases, there should be far more sentences devoted to good facts than bad.

**Using Space, Part 2.** Make sure you do not clutter your fact statement with extraneous information. As you go through your story, ask yourself whether each fact you include is necessary either because it is relevant, emotionally affecting, or important to the context. Sometimes lawyers call this the "so what?" question. Are some of your included facts "so what?" facts, meaning that if you took them out, it would change absolutely nothing about the case or the reader's understanding? Get rid of them. They force the reader to wade through a lot of clutter to get to the gems.

Compare these:

| **Example 1** | **Example 2** |
|---|---|
| At 2:10 AM, on Tuesday, September 2, 1986, Officer Joyner was told by his dispatcher to investigate a disturbance on the fourth floor of the building at 642 Sutherland Street. (T. at 162.) There he took a complaint from Kenneth Novak, a tenant in apartment 4-C, and, as a result, arrested Ms. Leyland, who lives in apartment 4-E. (T. at 163-65.) Officer Joyner was not able to leave the building with Ms. Leyland until 2:45 AM because she had been asleep and needed to dress. (T. at 166-67.) Ms. Leyland testified that she was so tired that she fell asleep in the police car during the drive to the precinct station. (T. at 14.) Cynthia Scollard, a police booking clerk, testified that she was on duty at about 3:05 AM on September 2, when she heard a commotion in the precinct parking lot. (T. at 145.) Ms. Scollard further testified that she noticed Ms. Leyland's injuries as soon as Officer Joyner turned Ms. Leyland over to her, and that Ms. Leyland appeared to be very tired at the time. (T. at 147-49.) | Ms. Leyland was awakened and arrested by Officer Joyner at her apartment shortly after 2 AM on the day she was beaten. (T. at 162-67.)<br><br>A police booking clerk testified that she heard "a man yelling in the parking lot" just before Officer Joyner brought Ms. Leyland into the precinct station. (T. at 145.) The booking clerk also testified that she immediately noticed bleeding from Ms. Leyland's lip and from the side of her head (T. at 147-48), and that Ms. Leyland's face began to swell during booking (T. at 148-49.) |

In the passage on the left, the following are all clutter: the date, the address, the precise times, the booking clerk's name, and the details about Leyland's tired state. The passage on the right omits the unnecessary facts, opening up room to dwell on the details that are truly essential.

**Using Language.** Consider carefully what you want to call people, events, and things. Choose words that resonate with your theory. Use vivid, memorable language for your good facts. Consider the effect of words and the images they conjure. In terms of people, think about the difference between calling someone a "defendant" versus "Mr. Harris." Or calling people "rioters" as opposed to "protestors." Or calling the entity in a criminal case "the prosecution" versus "the People of Indiana" versus "the State."

The *Safford v. Redding* case in Chapter 24 is a good example of the importance of what to call things or events. In that case, recall, a middle school student was searched on suspicion that she possessed prescription-strength ibuprofen. The School District refers to "drugs" multiple times in its brief, occasionally referring to "OTC" drugs (over the counter) or "IBU 400s." Savana's brief refers to the drugs almost exclusively as "ibuprofen."

## §25.5 Dealing with Bad Facts

Every case has bad facts — those facts that are damaging to your client's position. Although the professional rules of ethics impose upon lawyers a duty of candor, that duty does not require lawyers to disclose bad facts to the tribunal in a litigation setting.[1] The decision to include bad facts is most often a strategic one, and depends on many factors.

If the damaging fact is one that the other side is likely to disclose and rely on, or the court is likely to learn of it, good advocacy counsels in favor of confronting that fact and trying to neutralize it. Lawyers sometimes call this "drawing the sting," or "inoculation."[2] Confronting bad facts has two advantages. First, it makes you look credible and reasonable in the eyes of the court, the benefit of which cannot be overstated. Second, by confronting the bad fact, you take full advantage of the opportunity to characterize that fact (hence, "drawing the sting").

There are several strategies for handling bad facts in written advocacy, including:

**Structure: Juxtapose a Bad Fact Next to a Favorable Fact That Explains, Counterbalances, or Justifies It.** This is often, but not always, done through the "Even though [this], [that]" or "Although [this], [that]" formulation. In a

1. Model Rules of Professional Conduct, Rule 3.3.
2. Kathryn Stanchi, *Playing with Fire,* 60 Rutg. L. Rev. 381 (2008).

case about the legality of a search, the brief for the United States might juxtapose the fact of the search (a bad fact for them) with the reason for it (a good fact): "TSA agents made the determination to examine Mr. Ballard's luggage only after Jessie, a drug-sniffing beagle, had signaled that Mr. Ballard's suitcase contained contraband."

**Language: Passive Voice, Euphemizing.** Generally the passive voice should be avoided because it is wordy and creates ambiguity. See Question 21-J in Chapter 21. However, good advocates learn to *control* the passive voice, using it effectively to deflect blame. Think about the difference between "Agents of the TSA patted her down and then emptied her suitcases of all their contents" and "She and her belongings were looked over for contraband." The passive hides the actors and obscures power, agency, and authority. Passive makes it seem like things "just happened." This can be a valuable tool for the advocate. You can use it, but use it wisely, and *control* your use.

Similarly, you can euphemize. The same way you used vivid, colorful language to describe your good facts, you can use less "charged" language for your bad facts. Think about the difference between the terms "search" and "look over" or "inspect." All of these words have different connotations. Like everything else in the brief, the words you choose to describe the key components of the case should be carefully chosen.

**"Bury" the bad facts structurally and devote less space to them.** Although hiding bad facts by avoiding points of emphasis and using generic language is often effective, using *only* these methods to deal with bad facts is like sticking your head in the sand. You can't hide or ignore facts that your opponent is going to emphasize. Use this method, but use it in conjunction with one of the other methods described for full effect.

## §25.6 The Procedural History

So far, we have been talking exclusively about the facts related to the dispute between the parties — what conflict happened between the litigants that brought them to court. But the fact statement has another important component: the procedural history. You are likely familiar with the concept of procedural history from briefing cases for your other classes. In an appeal brief, the procedural history covers what happened before the appeal was filed. In a motion brief, it covers what happened leading up to the filing of the motions at issue. If it is advantageous to the client, the procedural history might include detail about the substance of what happened below. For example, if the appellate brief writer won in the trial court, he or she may elaborate on the trial court's reasoning.

The type of information to include in the procedural history will vary depending on context, including how critical procedure is to the resolution of

the case (e.g., Is there a procedural issue?), and how complicated the procedural posture is.

## §25.7 How to Evaluate Your Statement of Facts

**25-A** Does your opening paragraph focus on your best core facts and/or make clear your theory of the case?

**25-B** Have you used structure, space, and language to tell the story as persuasively as possible?

**25-C** Have you emphasized favorable facts?

**25-D** Have you neutralized unfavorable facts?

**25-E** Have you humanized your client?

**25-F** Have you made careful decisions about what to include and exclude? Is the statement of facts streamlined, with little "so what" clutter?

**25-G** Have you checked your statement of facts for inferences and legal argument? Have you checked for overuse of adjectives or adverbs?

**25-H** Have you included a procedural history?

## §25.8 Story Ethics

As you know, the rules of professional conduct forbid a lawyer from "[k]nowingly mak[ing] a false statement of material fact or law" to a court.[3] But even if the rules were silent, you should never be misleading or false with the court. As a lawyer, your word is your bond and your reputation will precede you. It is also simply poor advocacy. And it will backfire because the court will be offended and likely hold it against your client. It is never a good day when your adversary accuses you of misrepresenting the facts in open court and the judge says, "Well, let's look at the record," and you cannot find the support for your statement.

Maybe this seems obvious to you, and you think you would never do such a dishonest thing. But being in advocacy mode can have a significant impact on your worldview. The authors have found that we have sometimes misremembered facts — coincidentally, always in favor of our clients — and have had to

3. Rule 3.3(a)(1) of the Model Rules of Professional Conduct.

look back carefully at our records after drafting the statement to be sure we were accurate. We weren't trying to mislead, but we sometimes found ourselves doing so inadvertently because we felt so passionately for our clients.

Also, the line between appropriate advocacy and overstatement is not an easy or bright line. We all know a lie when we see one, but it is harder to know whether a euphemism we use for a bad fact is legitimate advocacy or misleading. The best way to guard against this is (i) scrupulous citation to the record; (ii) thinking about making the statement in open court (Does it pass the straight face test?) and/or bouncing your characterizations off your peers or your professor; and (iii) checking your fact statement for inappropriate inferences and editorializing.

## Exercise I

Consider two examples, each of which is the beginning passage of a Statement of Facts. Assume that the plaintiffs are suing a backcountry hiking guide for negligence after the guide led them into disaster. (Citations to the record have been deleted.)

On June 11, the plaintiffs asked in Stove Pipe Springs whether a backcountry guide could lead them through certain parts of Death Valley. After some discussion, they hired the defendant to take them on a full-day hike the next day.

When they started out, the defendant carried a compass and map. Each plaintiff carried sunglasses, a large-brim hat, and a quart of water.

At trial, a climatologist testified about the climate in Death Valley. Occasionally, winter temperatures fall below freezing, but there is no water to freeze. Spring and fall temperatures approximate summer temperatures elsewhere. July is the hottest month, with an average high of about 116° and an average low of about 87°. The highest temperature reliably recorded in Death Valley was 130°. Reports by early explorers of temperatures above 150° have not been confirmed or repeated through official measurements. Average annual rainfall is about two-and-a-half inches, and the number of days on which precipitation falls in an average year is eight.

The climate in Death Valley is one of the hottest and driest known. The highest temperature recorded each year reaches at least 120° and can exceed 130°. The highest temperature reliably recorded in Death Valley is one of the highest temperatures recorded anywhere on earth. The rainfall is only two-and-a-half inches per year — the lowest in the Western Hemisphere — and in a few years, no rain has fallen at all.

In the summer sun there, a person can lose 16 quarts of perspiration a day, and — in 3% humidity — die of dehydration unless the lost water is quickly replaced. A person becomes delirious after eight quarts are lost. At that heat and humidity, unprotected wood can split open spontaneously.The defendant advertised himself as a professional and experienced backcountry guide. He was hired by the plaintiffs and then took them into Death Valley for a full-day hike on a June day with one quart of water each.

After reading the example on the right, you're probably ready to believe that this hike was madness, and that the guide was responsible for it. How did the example on the right persuade you? How is it different from the example on the left?

## Exercise II
## Escape from Prison? (Rewriting Fact Statements)

Orville Bradwyn is being tried for attempted escape from prison. Below is a Statement of Facts for the prosecution, followed by one for the defense. (Citations to the record have been omitted.)

Rewrite each Statement.

*For the prosecution:*

The defendant is a prisoner at the Simmonsville Penitentiary. On July 6, he was not in the dinner line where he was required to be, and Sgt. Tunmeyer, the prosecution's sole witness, organized a search for him. According to Sgt. Tunmeyer, no prisoner is allowed in the laundry room after 5 PM, and the defendant was found in the laundry room at 7:39 PM. The reason for this rule is that the laundry room is an obvious place from which to escape. The prison does the laundry of the state hospital nearby, and hospital trucks pick up hospital laundry directly from the prison laundry room. At 5 PM, Sgt. Tunmeyer checked the laundry room thoroughly, did not see anyone, and subsequently locked the door. Even though the defendant had been assigned to work in the laundry, he was not on duty when he was found in the laundry. Before and after dinner, prisoners are free to move about outside their cells. When the defendant's cell was checked, many of his personal belongings were found. In fact, the defendant had a reputation for being tidy, and was drying all of his clothes when found in the laundry at 7:39 PM. However, when his cell was checked, his radio had been left on, and some material had been left under the covers of his bed to make it look like someone was asleep there.

*For the defendant:*

Mr. Bradwyn is an inmate at the Simmonsville Penitentiary. At this prison, inmates are free to move about outside the cells before and after dinner, which is from 6:00 to 7:00 PM. The prisoners are counted each day in the dinner line, and when Mr. Bradwyn was not present, he was considered missing. Prisoners are not allowed in the laundry after 5 PM because the laundry room provides an obvious escape route on the truck the state hospital sends at 8 PM each night to pick up its laundry. Sgt. Tunmeyer testified that he checked the laundry at 5 PM and locked it up without seeing Mr. Bradwyn there.

When Mr. Bradwyn was discovered to be absent from the dinner line, Sgt. Tunmeyer organized a search and found him in the laundry room at 7:39 PM,

where Mr. Bradwyn was drying his prison uniforms. There was no testimony about how Mr. Bradwyn could have entered the laundry room, which Sgt. Tunmeyer claims to have locked. Mr. Bradwyn is one of the prisoners assigned to work in the laundry. Sgt. Tunmeyer admits to past quarrels with Mr. Bradwyn, and that Mr. Bradwyn had filed a complaint against him for beating him. He also admitted that Mr. Bradwyn is an unusually tidy person who does not like other people to touch his things, and that at 7:39 PM, all of Mr. Bradwyn's clothing was in a dryer.

The state has not introduced any evidence that Mr. Bradwyn was not on duty earlier in the day. Nor has it introduced any evidence that Mr. Bradwyn could not have been locked in the laundry room accidentally by Sgt. Tunmeyer at 5 PM.

# 26 Developing Persuasive Arguments

## §26.1 What Is an Argument?

*An argument is a group of ideas arranged logically to convince a reader or listener to do a particular thing or to adopt a particular belief.*

That doesn't include hostile comments between drivers after a fender bender in a parking lot. The drivers are really venting anger, neither of them having any hope of persuading the other. Nor does it include aggressive expression of one's opinion on politics, fashion, or sports. Many people are eager to state their opinions so that you know what they think—and not with the intent of changing your mind. But if they are truly trying to persuade you, they're making a genuine argument.

Uncapitalized, the word *argument* means a contention designed to persuade. Capitalized, an *Argument* is the largest portion of a motion memo or appellate brief. An Argument might include many separate individual arguments.

In designing an argument, your first question should be, "What will make the reader or listener *want* to agree with me?" A good argument will *affect* the audience. It leads readers or listeners through reasoning so convincingly that, at the end, they are pleased to be persuaded.

Most disputes are two-sided in the sense that each side can make credible arguments, and it takes real work for the judge or jury to choose between them. Here is an example of opposing arguments from the parties' briefs in *Lawrence v. Texas*:[1]

1. 539 U.S. 558 (2003) (citations omitted).

Section 21.06 puts the State of Texas inside its citizens' homes, policing the details of their most intimate and private physical behavior and dictating with whom they may share a profound part of adulthood. Texas has enacted and enforced a criminal law that takes away — from same-sex couples only — the freedom to make their own decisions, based upon their own values and relationships, about the forms of private, consensual sexual intimacy they will engage in or refrain from. The State defends this law only by saying the majority wants it so. Texas asserts a power of the majority to free itself from state dictates about private, consensual sexual choices, while using the criminal law to condemn and limit the choices of a minority. This law and its application to Petitioners violate both the guarantee of equal protection *and* fundamental liberties safeguarded by the Fourteenth Amendment.

The States of the Union have historically prohibited a wide variety of extramarital sexual conduct, a legal tradition which is utterly inconsistent with any recognition of a constitutionally protected liberty interest in engaging in any form of sexual conduct with whomever one chooses. Nothing in this Court's "substantive due process" jurisprudence supports recognition of a constitutional right to engage in sexual misconduct outside the venerable institution of marriage. This Court should adhere to its previous holding on this issue in *Bowers v. Hardwick*, and it should reaffirm that the personal liberties protected by the Due Process Clause of the Fourteenth Amendment from State regulation are limited to those "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Your job is to make your arguments more appealing than your adversary's, or to make your adversary's arguments weaker by pointing out their flaws, or — preferably — to do both of these things. This chapter explains how.

## §26.2 What Judges Expect from Written Argumentation

Judges are busy readers who view any assertion skeptically and who must make many decisions in short periods of time. Thus, they need complete but concise arguments that can be quickly understood.

Judges are not experts in all areas of the law. In most courts, judges cannot specialize in particular areas of substantive law; they must decide any case you bring before them. Unless a case turns on parts of the law about which a judge

has thought deeply lately, the judge will depend on you to explain what the law is and how it governs the case. And a judge knows nothing at all about the facts of a case, except for what can be learned through the lawyers and their evidence.

Your job is to teach and persuade at the same time. Think of a motion memo or appellate brief as a *manual on how to make a particular decision* (and on how to write the opinion that justifies that decision). A lawyer who can show the court how the decision should be made, by laying out all the steps of logic, stands a much better chance of winning.

## §26.3 Types of Legal Arguments

> A carefully prepared, carefully stated, lawyer-like written argument is a work of art and a joy forever.
>
> —*E. Barrett Prettyman*

Good legal arguments are reasonable and accurate, appear reliable, and make your client's victory appear *inevitable* — either because the higher courts will reverse any other result, or because it's the only right thing to do, or both. The feeling of inevitability is a judge's selling point. It's reached by laying out for the judge every step of logic so that your conclusion becomes irresistible as the argument proceeds. It is accomplished by making an assertion and then backing it up with evidence (from your record) and authority.

### §26.3.1 Motivating and Justifying Arguments

Arguments can fall into two basic categories: motivating and justifying.

Motivating arguments make the judge *want* to rule for your client. They are not so much about legal proof as they are about emotion or intuition. Aristotle called this *pathos.* Pathos gives your arguments an intuitive, gut appeal. They make the judge believe your position is right in a grand sense of achieving justice — not just legally correct.

This is how you might express the motivating argument in the Appendix F motion memo:

> The Defendant did not take basic precautions to make sure he did not file a claim barred by *res judicata*.

Note the way the motion memo reinforces the idea of the defendant as a bad actor by emphasizing his failure to act and highlighting how simple the precautions would have been. This motivates the reader to see the defendant in a negative light.

Justifying arguments are those based in law, fact, and proof. A justifying argument shows proof of a conclusion of law according to the paradigm explained in Chapters 11 to 14. In a justifying argument, you identify the controlling rule of law and show that the rule's application to the case facts leads to a positive result for your client.

A simplified version of a justifying argument in the Appendix F motion memo would be:

> The Defendant has not met his burden of proof by providing evidence to support his bona fide error affirmative defense.

This argument relies on providing concrete legal standards and applying them to the case facts.

A good Argument section in a motion memo or appellate brief will include both types of argument. A motivating argument alone isn't enough, because even a motivated judge isn't supposed to act without a solid legal justification. Have you ever seen an opinion without citations to authority? No. That is why motivating arguments are not enough. A justifying argument is also often not enough, particularly if the law can be interpreted in more than one reasonable way. When a judge is given a choice between two conflicting justifying arguments, each of which is reasonable, a motivating argument can affect which choice the judge makes.

### §26.3.2 Policy Arguments

Policy arguments are arguments about the effect that the rule you are advocating will have in the future. Policy arguments answer questions such as: If the court does as you request, how would the law in the future treat facts that are similar to — but not exactly the same as — yours? What would be the practical effects in the courts, in the economy, and in society as a whole? Why is the rule you advocate better than the one your adversary urges?

Policy arguments can be highly motivating, especially in a close case. While there is no standard structure, here is a sound approach for making policy arguments:

1. Begin by identifying one or more public policies that a decision in your favor would further. Tell the court exactly which policy or policies you want the court to be guided by.
2. Then persuade the court that the policy or policies you've identified are valuable. Your adversary will urge competing policies. Show that yours are more important. But it's not enough just to say yours are worth more; prove it with argument.

3. Finally, show exactly how a decision in your favor will further the policy or policies you've identified. Don't assume that the court will understand how. Explain it specifically.

Prove policy with authority. Judicial opinions often include policy and are a good source of authority. Common policy concerns addressed in cases include public health and welfare; enforceability of rules; ease of administration; and the proper role of courts. Policy considerations may differ from state to state. In Arizona, for example, public policy disfavors solutions that interfere with development of land for homes and industry, while in Vermont, policy prefers conservation, the environment, and preservation of agriculture. Some states favor providing tort remedies, even at some risk to judicial efficiency, while in others, the reverse is true.

If you lack legal authority, cite and explain nonlegal sources that show a genuine public need. For example, if you argue that the courts should adopt strict tort rules assigning liability for contamination with industrial chemicals, you can cite scientific studies showing the presence of PCBs and other toxic chemicals in the food supply.

When a court is being asked to clarify the interpretation of a statute, the court isn't free to attach to the statute any policy the judges like. Instead, the court must use the policy that the legislature adopted when it enacted the statute. Sometimes that policy is expressed in the statute or the legislative history. If not, the court, with your assistance, must figure out what policy the legislature probably adopted.

You should also go beyond that, and demonstrate that what you want will also produce the best result in future cases, remembering that the decision will become precedent. If a court must choose between competing rules, for example, show that the rule you urge is better than others. If you win, the decision will stand for that rule.

Lawyers tend to introduce policy-based arguments with phrasings like the following:

> This Court should reject the rule urged by the defendant because it would cause . . .
>
> Automobile rental companies [or some other category of litigants] should bear the risk of loss because . . .
>
> Not only is the order requested by the plaintiff not sanctioned by this state's case law, but such an order would violate public policy because . . .

Remember, however, that policy arguments are used to reinforce argument from authority. Only where authority is unusually sparse should policy arguments play the predominant role in a theory.

### §26.3.3 Brainstorming Arguments

Legal arguments come in many different forms. We'll outline just a few here. Many of these are based on Wilson Huhn's *The Five Types of Legal Argument.*

**Arguments from text.** Common in statutory and constitutional issues, these arguments posit that a result is mandated by the plain language of the legal text at issue. You have probably seen judges talk about the "common meaning" of a word, or even use a dictionary to support what most people believe is the meaning of a particular word or phrase. That's argument from text.

**Arguments from precedent and analogy.** As the most common legal argument, these posit that the court should reach a result because courts have reached similar results in similar cases.

**Arguments from intent.** These are close cousins of policy arguments, discussed below. But instead of focusing on general social good, these arguments posit that a result is required because *it is what the law intended to happen.* You will often see these arguments in statutory or constitutional cases, but they also crop up in common law. All laws have a reason or purpose for why they were passed or made. Judges are meant to interpret and apply the law to serve those purposes. Arguments from intent state that the *law's purpose* is best accomplished by a decision in the advocate's favor.

You will need authority to support your intent arguments. Sometimes a statute will be very clear about the purpose it has meant to serve. Other times, intent must be inferred (by you or the court) by looking at legislative history, or even sometimes newspaper articles about the law. For example, you can easily discern the purpose of "Megan's Law," which required sex offenders to register in a state database, by looking at news accounts surrounding the law.

**Policy Arguments.** As discussed above, these arguments posit that a ruling in favor of the advocate's position will result in a social good and/or a ruling against the advocate will result in a social evil.

### §26.3.4 Selecting and Organizing Your Arguments

**Macro Organization.** First, decide on the big picture — which arguments to include, and in what order to present them. You might be tempted to include every point you can think of to support your theory and refute your adversary's arguments. This approach can hurt more than help. Instead, focus sharply on your strongest points. Develop them fully, and leave out the weak ones. As Holmes put it: "strike for the jugular and let the rest go."[2]

2. Oliver Wendell Holmes, *Speeches* 77 (1934).

Include only those arguments which, in your judgment, have a reasonable chance of success. A "reasonable chance" doesn't mean certainty, and, in a case where you have nothing better, it might not even mean probability. To be worth making, however, a contention should have the potential to lead to a decision in your favor. Lawyers often use the "straight face" test: If they would feel comfortable making the argument to a judge's face (say, during oral argument), then it is worth putting in the brief.

Once you have decided which arguments to include, consider the most effective way to organize them. The general rule is "strongest arguments first," unless logic dictates otherwise.

For example, if your adversary must prove that a five-element test has been satisfied, and if you think that your adversary's proof is weakest on element number three, don't argue the elements in the order in which they're listed in the controlling statute. Argue element three first, because as far as you're concerned, it's the controlling element. Your adversary will likely have a very different organization, for example, arguing the elements in the order they appear, or addressing those elements that are easier to satisfy before those that are more challenging.

Sometimes, however, the logic of the dispute requires that the strongest material be delayed to avoid confusing the court. Some arguments are simply hard to understand unless preceded by less punchy material. In these situations, you must weigh your need for clarity against your need to show merit from the start.

**Micro Organization.** While justifying arguments can be organized through the paradigm formula because they are proofs of a conclusion of law (see Chapters 11 to 14), motivating arguments are more often appeals to a human sense of justice or pragmatic policy needs. Motivating arguments can be made at any point in the Argument section of a motion memo or a brief, but they often work best at the very beginning of a section. Here is an example of how to incorporate motivating arguments into the paradigm structure:

*Conclusion:* You can "beef up" the conclusion with additional sentences incorporating why your result is fairer, why it is more likely to work justice, or any other motivating argument. Note that the conclusion part of the paradigm can be more than one sentence.

*Rule:* You can add material here about the intent of the rule, and why your articulation of the rule best serves the intent. You can also insert policy here to show that your rule will best serve some public policy.

*Rule proof:* If the cases discuss intent or policy, include that in your discussion of the cases. You can add nonlegal materials here to support what the cases say, particularly if the cases say it in a conclusory manner.

*Application:* Use the policy that you have raised in the first parts of the paradigm to apply your rule. Show how the facts of your case directly implicate the intent or policy at issue.

**Communicating Organization.** Use "signposts" to persuade and organize. Don't let the judge grope for clues about how your arguments relate to each other. Instead, use concrete language to help the judge see your focus. Review how to use point headings (Chapter 30). Use paragraphing to signal a change in topic or argument. Use thesis sentences to show the main point of the paragraph to the reader. And use transitional words and phrases to show how your points are cumulative:

> There are three reasons why . . . First, . . . Second, . . . And finally, . . .
> Not only has the defendant violated . . . , but she has also . . .

These verbal and visual cues will make your Argument easier to follow and understand, which will enhance its persuasion.

### §26.3.5 Stating Rules Clearly and Persuasively (Rule and Rule Proof)

Your argument must make clear the legal rule that supports the outcome you are advocating to the court. That rule might not be exactly as stated in the cases you cite. In fact, the cases might enforce the rule without stating it at all, and you might have to figure out what the rule is based on the court's reasoning, particularly the way it treats the facts.

State the rule in a way that leads to a decision in your client's favor when it is applied to the facts. The judge drafting an opinion will want it to be as convincing as possible to the parties, to the bar, to the public, and to any higher court to which the decision could be appealed. That is a hard task where a gap in the law must be filled. The judge who asks in oral argument in a gap-filling case, "Counselor, what rule would you have us enforce?" really wants to know — if the lawyer prevails — how the court should word the second component of the paradigm formula when it writes the opinion. Your goal should be to describe the rule in a way that the court can adopt it without modification.

To convince a court to adopt a rule you are advocating, you need to provide sufficient authority to show that the rule is legally justified. Consider the amount of citation and explanation a skeptical but busy judge would need. Separate the authorities into categories based on how much influence they will have on the outcome. Think in terms of cause and effect. If you had to make the judge's decision, which authorities would probably have an effect on you — *even an effect adverse to your client's position*? Thesis sentences will help you here — you should be able to articulate the goal of using a particular case or line of cases, and that goal should be clearly stated in a thesis sentence. The motion memo in Appendix F provides a good illustration of effective rule statements in the roadmap section (between headings I and A).

The amount of authority, and the depth of explanation required, will depend on how much is needed to clarify the issue involved, how disputed

that issue is, and how important it is to your theory. At one extreme, an idea may be so complex, so disputed, and so critical that it must be supported by a comprehensive explanation, filling many pages of major authorities. At the other extreme, if the court is apt to be satisfied with a mere conclusory explanation, you should limit citation to one, or, at the very most, two cases. (For example, notice how the test for summary judgment is proved in the memo in Appendix F.)

### §26.3.6 Working Carefully with the Facts (Fact Application)

A court rules for one party over another not merely because the law is abstractly favorable, but, more importantly, because the law and facts *combine* favorably. After all the work of explaining the law, a beginner might assume that the application to the facts is obvious, but it hardly ever is. Don't assume that merely mentioning the facts is enough: argue the facts. In other words, *show* the court exactly how the determinative facts require the decision you seek. If you set up your rule persuasively, when you apply it to the facts, it should seem clear and obvious that it leads to the outcome you seek.

The key to arguing the facts is to make sure nothing in the "fact application" is a pure statement of fact. Instead, the sentences should connect law and fact. For example, if you are arguing that a defendant is liable for reckless driving when he was driving at the posted speed limit in the middle of a snowstorm, you might state as the rule, "a driver is liable for maintaining an unsafe speed in disregard of adverse weather conditions," and then in applying that to the facts, go into detail about the conditions at the time of the accident. A pure fact is "John drove through the snowstorm." A combination of law and fact is "John *disregarded the snowstorm when he maintained his speed on the highway*."

Review your fact application for "so what?" problems. A pure fact assertion such as "John drove through the snowstorm" will make a legal reader say "so what?" because the writer has not told the reader why John's unsafe speed matters legally.

There is more room for inference and vividness in the Argument fact application than in the Statement of Facts, but restrain yourself from melodrama. Try to hit the line between being vivid and argumentative and being overly dramatic. It's the difference between a reader's sympathy and a reader's eyeroll. We wish we could give you an easy rule for this, but experienced lawyers struggle with this line. The best way to learn is to try different methods and get feedback.

## §26.4 How to Handle Adverse Authority and Arguments

Which authorities most strongly favor your adversary? (Make a list.) What is your adversary's strongest argument? Her second strongest argument?

If you're having a hard time answering these questions, you haven't begun to see the case as a whole.

Ignoring adverse authority won't make it go away. It just gives opposing counsel the opportunity to characterize it, and you lose the opportunity to show why it doesn't undermine your argument. Also, if you ignore it and the court learns about it, be prepared for the court to be very angry and draw negative conclusions about your credibility.

**Dealing with Mandatory Adverse Authority.** If the adverse authority is a statute, court rule, or administrative regulation, you must show that the provision does not apply to your case, or that it applies in a way that favors your client. Statutory language is almost always ambiguous and susceptible to multiple interpretations, one of which could favor your client. Although it may seem tempting to argue that a statute you don't like is unconstitutional, courts rarely sustain such attacks. You should frontally attack a statute only if there's significant doubt — shared by respected lawyers — about its validity.

If the adverse authority is precedent, try to weaken it using the techniques described in Chapter 9. Consider distinguishing the precedent, focusing on significant — and not merely coincidental — differences between the precedent and your case. But be sure that these differences pass the "so what?" test. The differences on which you rely should be legally significant. Hypertechnical discrepancies and minor factual variations won't persuade because they seem arbitrary, rather than a basis for a just decision. Another approach might be to reconcile the precedent with your case, showing that, although the precedent seems superficially adverse, its underlying policy would actually be furthered by the ruling you want from the court. Still another approach is to attack the precedent head-on, challenging its validity on the grounds that it is poorly reasoned or that changes in society or in public policy have made it unworkable. For reasons similar to those outlined above about frontal challenges on statutes, this should be a last resort.

**Adverse Authority That's Not Mandatory.** If the adverse authority is from outside your jurisdiction, then you are much freer to criticize and urge the court to reject it. If a judge must choose between competing out-of-state rules, she won't be able to decide without rejecting at least some precedent as ill-founded. This is where policy arguments can make a difference.

Make your own arguments before refuting opposing arguments. You'll win more easily if the court's dominant impression is that you deserve to win, rather than that your adversary deserves to lose. A defensive tone can undermine an otherwise worthwhile argument. For that same reason, give adverse arguments only the space needed to dispatch them and no more. The overall tone of your motion memo or appellate brief should be affirmative, not defensive. Consider counting paragraphs to see how many are positive, affirmative

arguments and how many rebut arguments from the other side. Positive should greatly outweigh negative in most cases.

Beginners often have difficulty writing the transition and thesis sentences that introduce attacks on opposing arguments. As with your thesis sentences in your positive argument, the thesis sentence introducing your rebutting argument should encapsulate your response. For example:

> The plaintiff misconstrues § 401(d)(1). Four other circuits have already decided that § 401(d)(1) provides for X and not, as the plaintiff contends, for Y. [*Follow with an analysis of the circuit cases.*]
>
> No appellate court has held to the contrary, and the few district court decisions cited by the plaintiff are all distinguishable. [*Follow with an analysis of the district court cases.*]
>
> The legislative history also demonstrates that Congress intended to provide for X and not for Y. [*Follow with an analysis of the legislative history.*]

These opening sentences are written so that opposing counsel's contention is surrounded by the writer's counter-contention and the beginning of the counter-contention's proof. Avoid giving voice to the other side's argument by saying, "the plaintiff argues . . ." or "the defendant states that . . ." .

An "although" clause can be useful in thesis and transition sentences:

> Although the House Judiciary Committee report states that its bill would have provided for Y, the Senate Judiciary Committee actually drafted § 401(d)(1). Both that committee's report and the conference committee report flatly state that § 401(d)(1) provides for X.

## §26.5 Argumentation Ethics

The rules of professional ethics place limits on what you're permitted to do in argument.

First and most basically, you're forbidden to "knowingly . . . make a false statement of fact or law" to a court.[3] The whole system of adjudication would break down if lawyers did not speak honestly to courts.

Second, you must inform a court of "legal authority in the controlling jurisdiction" that you know "to be directly adverse to the position of [your] client and not disclosed by opposing counsel."[4] You aren't required to disclose out-of-state authority; you're required to disclose authority in your jurisdiction that's "directly adverse" to your arguments if your adversary hasn't disclosed it.

3. Rule 3.3(a)(1) of the ABA Model Rules of Professional Conduct.
4. Rule 3.3(a)(2) of the ABA Model Rules of Professional Conduct.

Third, you may not advance a theory or argument that is "frivolous," except that you may make a "good faith argument for an extension, modification or reversal of existing law."[5] In a legal system like ours, where "the law is not always clear and never is static," the rules of ethics permit you to advance theories and arguments that take advantage "of the law's ambiguities and potential for change."[6] But a frivolous theory or argument — one that stands little chance of being adopted by a court — is unfair to courts and to opposing parties because it wastes their time, effort, and resources.

Separate court rules that are procedural, rather than ethical, in nature also punish lawyers who make frivolous arguments. In federal trial courts, for example, every "pleading, written motion, and other paper" must be signed by a lawyer, whose signature certifies "that to the best of the [signer's] knowledge, information, and belief, formed after inquiry reasonable under the circumstances . . . the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or establishing new law."[7] Where that standard is violated, the court has the power to impose monetary fines on the offending lawyer.[8] Similar rules govern in appellate courts.[9]

## §26.6 Evaluating Your Arguments

As you develop your arguments, consider whether you have included the elements that will make your Argument section strong and persuasive.

**26-A** Have you designed a compelling theory and backed it up with persuasive arguments?

**26-B** Have you made both motivating arguments and justifying arguments and included policy arguments where relevant?

**26-C** Have you limited your contentions to those that have a reasonable chance of persuading the court?

**26-D** Have you organized to emphasize the ideas that are most likely to persuade?

5. Rule 3.1 of the ABA Model Rules of Professional Conduct.
6. Comment to Rule 3.1 of the ABA Model Rules of Professional Conduct.
7. Fed. R. Civ. P. 11.
8. *Id.*
9. For example: "If a court of appeals determines that an appeal is frivolous, it may . . . award just damages and single or double costs to the appellee." Fed. R. App. P. 38.

**26-E** Have you made your organization obvious?

**26-F** Have you given the court a clear statement of the rule or rules on which the case turns?

**26-G** Have you relied on an appropriate amount of authority with an appropriate amount of explanation?

**26-H** Have you explained exactly and in detail how the law governs the facts?

**26-I** Have you reinforced your theory with carefully chosen wording?

**26-J** Have you confronted openly your weaknesses and your adversary's strengths?

**26-K** Have you enhanced your credibility through careful editing and through the appearance of your memo or brief?

# 27 Handling the Procedural Posture

## §27.1 Why Procedural Postures Matter

The procedural posture is the procedural event or events — such as a motion — that place an issue before the court. The procedure affects the type of decision a judge can make, and may also limit how the court can view the facts — so a lawyer writing a motion memorandum or appellate brief must take the procedural posture into account.

Each type of motion is governed by rules on how the motion is to be decided. For example, if you move for summary judgment, you must satisfy the test for summary judgment, which requires you to accept your opponent's version of the facts as you make your legal arguments. You are saying, in other words, that even if every fact relied upon by your opponent is true, you still win. In contrast, if you are moving to exclude an expert witness from trial, you may be entitled to provide the court with your own evidence to support your position. In an appeal, the appellate court may be limited to finding whether the trial court correctly followed the procedure, rather than independently deciding the case.

Because the procedural posture plays such a significant role in shaping the arguments you can make in a motion, memorandum, or appellate brief, identifying and understanding it should be your first step when preparing to write.

## §27.2 Types of Procedural Postures

Trial court motions fall into four very generalized categories: (1) motions that challenge the quality of an adversary's allegations (in a pleading); (2) other

motions that challenge the manner in which the litigation began; (3) motions that challenge the quality of a party's evidence; and (4) a large, catchall category of miscellaneous case-management motions. When a trial court's decision is appealed, the case moves into yet another procedural posture, where the trial judge's decision is evaluated according to a standard of review.

Rules governing how motions are decided may differ from state to state. Each state and the federal court system has its own rules of procedure. Check the rules that govern the jurisdiction for which you are writing a memorandum or brief, as well as the precedent interpreting those rules. Always check for local rules from the specific court where you will be filing the brief.

### §27.2.1 Motions Challenging the Quality of a Party's Allegations[1]

In litigation, parties initiate legal claims through documents called pleadings. In a civil case, the plaintiff's complaint alleges violation of a legal principle and the facts that support that violation. The complaint must allege facts that, if proven, would constitute a claim, or in some states a cause of action. If a defendant pleads a counterclaim or an affirmative defense, the defendant must allege facts that, if proven, would substantiate a counterclaim or affirmative defense. And in a criminal case, the government's indictment or information must allege facts that, if proven, would be a crime.

Because, at this stage in litigation, no evidence has been submitted, the facts mentioned in the pleadings are allegations. When ruling on motions attacking allegations, courts must generally assume that the alleged facts are true, but will eventually have to be proven by evidence submitted to the court unless the opposing party admits them in its own pleadings.

In a civil action, a defendant can move to dismiss a plaintiff's complaint for failure to state a claim. Because this motion tests the sufficiency of allegations (and nothing more), the record is limited to the four corners of the complaint. Motions to dismiss are often called "so what" motions: "Even if everything the plaintiff alleges is true, so what?" The court must assume the plaintiff will be able to prove all of the allegations and decide whether they meet the requirements of the legal claim. If the answer is yes, the case will move forward to give the plaintiff the opportunity to prove the allegations. If the court strikes all the claims pleaded in a complaint, the complaint itself is dismissed, and the litigation is over unless the plaintiff appeals. The plaintiff can also file an amended complaint with additional or reformulated allegations that would survive a motion to dismiss.

1. In the Civil Procedure course, you might have studied these motions under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Similarly in a criminal case a defendant can move to dismiss one or more counts in the indictment or information, or the entire indictment or information.

In motions challenging a party's allegations, you must be careful to avoid referring to facts as though they are proven. For example, you would write "the plaintiff alleges defendant was driving too fast," rather than "the defendant was driving too fast." If, however, the opposing party has admitted the fact, you may treat it as a proven fact and refer to it accordingly.

### §27.2.2 Motions Challenging Other Aspects of the Way in Which the Litigation Began[2]

A defendant might move to dismiss an action on the ground that the court lacks personal or subject matter jurisdiction, the venue is improper, the summons did not include all the information required, the complaint was improperly served, that some persons who must be made parties have not been, and so on.

Like motions challenging the allegations, these seek dismissal of the action at the earliest stage of litigation, before the defendant files an answer. These motions aren't limited to the contents of the complaint. If the defendant asserts that the summons was improperly served, for example, the court would ignore the contents of the complaint and would instead hear testimony from the process server and from the defendant about how the summons was delivered to the defendant.

### §27.2.3 Motions Challenging the Quality of a Party's Evidence[3]

These include (1) motions for summary judgment; (2) motions for directed verdict (or in federal courts, motions for judgment as a matter of law); and (3) motions for judgment notwithstanding the verdict (in federal courts, renewed motions for judgment as a matter of law). In contrast to the motions testing allegations in pleadings, these require the court to decide whether a party has carried a burden of production. There are also (4) motions for a new trial, which are analytically different from the other three and are explained further near the end of this section.

The burden of production (often called the burden of going forward) requires the party seeking relief to provide enough evidence that a rational fact finder — a judge or jury — could decide in that party's favor. The burden is defined by the relevant rules of procedure and by the case law interpreting those rules.

2. In federal courts, these are motions under other parts of Rule 12(b).
3. In federal courts, under Rules 50, 56, and 59 of the Federal Rules of Civil Procedure.

Although these motions are governed by different procedural rules, all three are decided according to approximately the same logic: The motion should be granted if (1) the opposing party has failed to satisfy a burden of production and (2) the law is such that the movant is entitled to a favorable judgment. These motions require a judge to apply the substantive law to the facts and determine whether the requirements of the claim can be satisfied. For example, if you move for summary judgment in a products liability case, the judge will have to decide whether the facts in the record meet all of the elements of a products liability cause of action.

A party brings a motion for a new trial after a verdict has been rendered. A new trial can be granted on two kinds of grounds: (1) the jury's verdict is seriously tainted through procedural faults, such as erroneously admitted evidence or inaccurate jury instructions; or (2) the verdict was against the overwhelming weight of the evidence. The first category obviously doesn't test the quality of a party's evidence. The second does, but it does so by examining the extent to which a burden of persuasion (rather than a burden of production) has been carried. A new trial isn't granted merely because the judge would have come to a different verdict if she had been the trier of fact. But it can be granted if the overwhelming weight of the evidence is on one side of the case and the jury returned a verdict for the other side.

### §27.2.4 Miscellaneous Case-Management Motions

These are housekeeping motions used to manage the progress of litigation, such as motions in discovery, motions for preliminary injunctions, and suppression motions in criminal cases. What makes these motions different from the ones you've just read about is that the granting of a management motion doesn't terminate the litigation; instead, management motions regulate the litigation's progress.

For example, before trial, a criminal defendant who gave the police a confession might move to suppress it, arguing that the police wrongfully obtained the statement by failing to inform him of his constitutional right to remain silent. If the court grants the motion, the statement cannot be used as evidence at trial.

## §27.3 Writing in a Procedural Posture

You will understand this section more easily if you read the Appendix F motion memo first.

Because much of law school is focused on studying the substantive law of torts, property, and so on, you might tend to view issues in the abstract ("should the plaintiff win?"). But judges are constrained by the procedural context in which issues are raised.

If, for example, a plaintiff moves for summary judgment, the judge can't just decide in the abstract whether the plaintiff should win the case. Instead the judge must decide whether there is sufficient evidence about the material facts, and whether the plaintiff is entitled to judgment as a matter of law (the test for summary judgment) — in other words, whether it is possible for a jury to rule in the plaintiff's favor. Compare these two Questions Presented:

> Is a painting contractor liable for negligence if he power-sands large amounts of lead paint from the exterior of a building and thus spreads lead paint debris over most of an adjacent preschool?

> Is *plaintiff preschool entitled to summary judgment for its negligence claim against a painting contractor if it is undisputed that* the contractor power-sanded large amounts of lead paint from the exterior of a building and thus spread lead paint debris over the adjacent plaintiff preschool?

The first question is stated abstractly without reference to the procedural posture. It will not make as much sense to the court as the second. The italicized words in the second example aren't throwaway jargon. They reflect the test for summary judgment and are at the core of the decision the court must make.

Similarly, on appeal, the question isn't whether the appellant should have won in the trial court, but instead whether the trial court's ruling was error as defined by the applicable standard of review (see §29.3). See Chapter 30 (Point Headings and Subheadings) for how to incorporate the procedural posture and appellate standard into your headings.

Because the procedural posture and the rules governing it control the way the judge will make the decision, you must show the judge how to decide within those procedural rules. How can you do that in writing?

First, remember that in a motion or appeal the threshold rule is procedural. It isn't the rule of substantive law that provides the remedy sued for. In a trial court, the threshold rules are the rules that govern how the motion is to be decided. On appeal, the threshold rules are the ones that govern the trial court's decision plus the appellate court's standard of review — so, you must develop your argument to be consistent with the limitations of those rules.

For example, the motion memo in Appendix F has been submitted by plaintiff Beatrice Russell in opposition to a motion for a summary judgment. In deciding the motion, the court will evaluate the record in terms of the elements of the test for summary judgment: whether there is a genuine dispute about a material fact and whether, on the undisputed facts, the movant is entitled to judgment as a matter of law. That test is invoked very early in Russell's Argument.

Second, some procedural tests incorporate the underlying substantive rules on which the litigation as a whole is based (causes of action, affirmative defenses, and so on). In the test for a summary judgment, that happens through the element requiring entitlement to judgment as a matter of

law. In the test for a preliminary injunction, it's done through the element requiring likelihood of success on the merits. In these situations, you make those substantive legal arguments within the framework of the procedural requirements.

Third, organize your paradigm variations around the procedural test. See Chapters 11 to 14. If the procedural test incorporates a substantive test, the substantive test operates as a sub-rule. To see how that's done, read carefully the Argument in Appendix F, which includes several sub-arguments inside the organization of an umbrella structure. The umbrella structure — set out under the major heading in Roman numeral I — is built on the test for a summary judgment. Because the second summary judgment element (entitlement to judgment as a matter of law) incorporates a rule of substantive law (the test for the bona fide error defense), proof of the second summary judgment element includes all of the arguments that show why the defense is not available. Note the way each argument ties back into why the defendant failed to carry his burden, and how that affects summary judgment. This tracks the sequence a judge will follow in deciding whether to grant or deny the motion.

Finally, be thoughtful about providing authority for the procedural test. Most procedural tests are so commonly invoked that judges know them by heart. A conclusory explanation (see §12.2) is often sufficient for rule proof. (And that's all that was needed at the beginning of Beatrice Russell's Argument in Appendix F. Can you find the sentence and cite where it happens?) But often, lawyers provide more. This may be necessary if the parties *disagree* about the appropriate formulation of the procedural rule. In other cases, lawyers might provide more as part of their persuasive rhetoric. A lawyer requesting summary judgment might cite a case that shows how easy it is to grant such a motion, while a lawyer opposing summary judgment might look for citations that say that summary judgment is an extraordinary remedy because it removes the case from the hands of a jury (or other fact finder) and should be granted sparingly.

## §27.4 Researching to Account for Your Case's Procedural Posture

You're looking for two kinds of rules:

First, you are searching for the rules that govern the *substance* of the controversy — definitions of causes of action, crimes, affirmative defenses, and other forms of rights and obligations like the ones you've already learned. This is by far the larger research task in nearly all instances.

Second, you're looking for the *procedural* rules that govern how the court's decision is to be made. Some examples are —

1. rules setting out the tests for granting various motions ("Summary judgment is appropriate if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law");
2. rules controlling how the court must evaluate the record before it on the motion to be decided ("In deciding a motion for summary judgment, the court views the evidence in the light most favorable to the party opposing the motion"); and
3. if an appeal has been taken, the rule defining the standard of review in the appellate court ("On appeal, a grant of summary judgment is reviewed de novo").

You can save a lot of research time if you first identify the type of motion involved and then look in the procedural statutes and court rules, as well as in the cases, for procedural rules that govern the motion's disposition. For any given motion, you'll probably find part of the procedural law in a statute or court rule and the rest in interpretive case law.

If you find the procedural rules in a procedural statute or court rule, the language may be subtle, but it won't be terribly hard to recognize. The section heading alone will usually announce that you have arrived at the right place — for example, "Rule 56. Summary Judgment."

In case law, when a court mentions the rules governing how a motion is to be decided, it usually does so immediately after reciting the facts and immediately before beginning the legal analysis. That is because the procedural rules are a threshold through which the court must pass in order to begin the analysis. This is typical of the kind of language you'll find:

> Summary judgment should be granted when the moving party shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. [Citation omitted]. In other words, the time and expense of the parties and the court should not be wasted on a trial when there are no material facts in dispute, one party is entitled to judgment on those facts, and thus there is nothing to try. In deciding a motion for summary judgment, all reasonable inferences are construed in favor of the nonmoving party. [Citation omitted]. The party opposing the motion for summary judgment must "submit evidentiary materials that set forth specific facts showing that there is a genuine issue for trial." [Citation omitted]. "The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts." [Citation omitted]. Summary judgment is properly entered against a party "who fails to make a showing sufficient to establish the existence

> of an element essential to the party's case, and on which that party will bear the burden of proof at trial." [Citation omitted].[4]

The first sentence is the test that must be satisfied before the motion can be granted. The rest are some of the rules that govern how the court is to evaluate the record before it on this particular type of motion.

4. *Sommers v. Target Corp.,* 382 F.Supp.3d 842, 846 (E.D. Wis. 2019).

# 28 Motion Memoranda

## §28.1 Motion Memorandum Format

When a motion is made, each party may submit a memorandum of law presenting an argument to the court about the decision it should make. A defendant moving for an order dismissing a complaint, for example, submits a document that might be titled "Memorandum in Support of Defendant's Motion to Dismiss." The opposing party's document might be titled "Memorandum in Opposition to Defendant's Motion to Dismiss." In some cases, the moving party can file a reply to their opponent's brief. This chapter describes the format of a motion memo and the process of writing one.

The format and structure of motion memoranda vary widely from jurisdiction to jurisdiction. Some courts have extensive local rules governing what should be included and specifying format requirements, and others have very few rules. Local custom also plays a role in how these documents are written, so it is always a good idea to check for local rules and ask a lawyer in the jurisdiction for a sample. The following are typical components of a motion memo, although not all memos include every one:

1. case caption and title
2. Table of Contents (typically if the memo is over a specified length, or if you want to gain the persuasive effect of showing all the point headings and subheadings in one place)
3. Table of Authorities (only if the memo is long and many authorities have been cited)
4. Preliminary Statement, also called an Introduction or Summary
5. Statement of Facts or Facts, also called a Statement of the Case

6. Argument (longer arguments are broken into sections indicated by point headings)
7. Conclusion
8. signature block

As you read the description below of each of these components, consult the sample brief in Appendix F.

The **case caption and title** correspond to the memorandum heading at the beginning of an office memorandum. The caption identifies the court and the parties, specifying their procedural designations (plaintiff, defendant, etc.). In a criminal case, the prosecution is called, depending on the jurisdiction, "State," "Commonwealth," "People," or "United States," and no procedural designation follows those terms in the caption. (The prosecution is not a "plaintiff.") The title identifies the memorandum and the purpose of its submission ("Memorandum in Opposition to Defendant's Motion to Dismiss").

If a motion memo includes a **Table of Contents**, it begins on the page after the caption page. If a **Table of Authorities** is included (and it usually is not), it appears on the first page after the Table of Contents. The tables are put together and paginated just as they would be in an appellate brief. They are explained in Chapter 29 (Appellate Brief Format), because they're often omitted from law school memo assignments. Although it is optional, a Table of Contents can help you persuade by compiling all your point headings and subheadings in one place so the reader can see a broad overview of your Argument. Point headings are explained in Chapter 30. Some lawyers add a Table of Contents to a medium- or large-sized motion memo to gain that advantage. A Table of Authorities, however, is needed only in an exceptionally large motion memo, approaching the size of an appellate brief.

The **Preliminary Statement** or **Introduction** or **Summary** follows the title in a motion memo that doesn't have tables. At a minimum, this section begins by introducing the judge to the parties, the procedural posture, the issues involved, and the relief sought by the moving party. Because it will likely be the court's introduction to your position, the section should strongly reflect your theory of the motion (see Chapter 24). The Preliminary Statement might also summarize your arguments, but this must be done very concisely. The point is to tell the judge why the matter is before the court, and to define the type of decision the judge is being asked to make. That can usually be done in less than a page.

Although a minimalist Preliminary Statement is acceptable, every component of a motion memo should be seen as an opportunity for persuasion, and the Preliminary Statement is no exception. Because it must be so concise, it is a good idea to write (or revisit) your Preliminary Statement after you write your argument and have a strong, solid articulation of your theory. A good Preliminary Statement sets the tone for the rest of the memo. A busy judge

might not want to keep going after a dull, dry Preliminary Statement. In contrast, a persuasive overview of your case can lead the judge to read further to see how you support your contentions.

The **Statement of Facts** or **Facts** or **Statement of the Case** corresponds to the Facts in an office memo, but there are differences in substance and in drafting technique. Chapter 25 explains how to write a persuasive Statement of Facts. The Statement of Facts is especially important in a motion memo because most motions require trial judges to make decisions based on their understanding of the facts, or factual allegations, rather than decisions about what the law is.

The **Argument** corresponds to the Discussion in an office memo, but here, the goal is to persuade as well as to explain. An Argument is organized into sections indicated by *point headings.* Those sections can be further subdivided according to the organizational principles outlined in Chapter 13. Chapter 30 explains how to construct point headings and subheadings. The Argument is the most complex component of a motion memorandum, but you have already learned many of the skills required. Additionally, you will need to know how to develop theories (Chapter 24) and arguments (Chapter 26).

The **Conclusion** is intended only to remind the reader of what you seek (or oppose), with an allusion to your theory, if that can be compressed into one or two sentences. You should not raise anything new in your conclusion that you haven't already clearly presented in the Argument section. Check your local rules (or ask your professor) to see what the courts in your jurisdiction prefer in a conclusion. Some courts prefer a one-line recitation of the relief you seek. Others prefer a very short summary of your theory and any further action you need the court to take. Compare the following:

**Conclusion**

> For all these reasons, this court should preliminarily enjoin construction of the logging roads here at issue.

**Conclusion**

> Thus, the Forest Service's authorization of these logging roads violates the National Environmental Policy Act, the Administrative Procedure Act, and the enabling legislation of the Forest Service. The harm would be irreparable, and an injunction would promote the public interest. This court should therefore preliminarily enjoin the Forest Service from building the roads.

The second example does a more complete job of reminding the court, in just a few sentences, of precisely what the writer wants and why it should be done.

The **signature block** appears under a line reading "Respectfully submitted." The signature block includes the lawyer's name, an indication of which party

he or she represents, and his or her office address and telephone number. In some jurisdictions, the lawyer also signs the memo.[1]

## §28.2 Writing a Motion Memorandum

As with office memos, lawyers differ about which part of a motion memorandum they draft first. But lawyers modify their habits somewhat from document to document — simply because a practice that works well in one instance might not work well in another.

Some lawyers start by writing the Preliminary Statement, because it is an overview of the case — but, as noted above, it is a good idea to revisit this section after you have solidified your theory. Other lawyers start with the Statement of Facts. Others may start with the point headings as a kind of outline. Still others may start with the Argument, using the drafting process to figure out organization and refine the theory. Wherever you begin, as you develop and refine each section, consider the effect on other sections, and revise accordingly.

The Conclusion, the Tables, and the signature block are best done last. The caption can be done at any time. Many lawyers use specialized software (or features of basic word-processing programs) to automatically generate the Tables.

While putting the memo through further drafts, ask yourself the questions in the checklists on the inside front and back covers of this book.

1. See, e.g., Rule 11 of the Federal Rules of Civil Procedure.

# 29 Appellate Briefs

## §29.1 Appellate Brief Format

Once an appeal has begun, all interested parties may file appellate briefs with the court, arguing for both the result and reasoning they want the court to adopt. The party seeking reversal — the appellant — files their brief first, and then the opposing party files a response. In some cases, the appellant can file a reply addressing specific arguments in the appellee's brief. This chapter describes the format of an appellate brief and the process of writing one.

As with any court document, always check local rules for specific requirements. In general, appellate briefs include the following components:[1]

1. cover page containing a caption and other basic information;
2. Table of Contents;
3. Table of Authorities;
4. if the appeal involves interpretation of a constitutional provision, statute, administrative regulation, or court rule, a reprinting of the relevant material;
5. Preliminary Statement, sometimes called an Introduction;
6. Question(s) Presented or Statement of Issues;
7. Statement of the Case or Statement of Facts;
8. Summary of Argument;
9. Argument, broken up with point headings;

1. Some courts require additional material, such as a statement specifying how the court acquired jurisdiction over the appeal in question.

10. Conclusion; and
11. signature block.

As you read the descriptions below for each of these components, consult the sample briefs in Appendices G and H.

The **cover page** includes the caption, followed by the document's title (such as "BRIEF FOR APPELLANT"), and information about the lawyer submitting the brief. The caption includes the name of the appellate court, the appellate court's docket number, and the names and procedural designations of the parties (appellant, appellee, etc.). Many courts require that the caption also include the parties' procedural designations in the trial court.[2] In federal appellate courts, the appellant is listed first in the caption, but in most state appellate courts, the parties appear in the same order in which their names have appeared in captions in the trial court. The cover page does not have a page number.

The **Table of Contents** begins on the page after the cover page. It lists all of the components of the brief (except the cover page and the Table of Contents itself); reproduces the point headings and subheadings from the Argument; and sets out the page on which each component, point, or subpoint begins. Because the point headings and subheadings are reproduced verbatim in the Table of Contents, a reader can look there for an outline of the Argument and for a quick grasp of the lawyer's theory of the appeal. When read together in the Table of Contents, the point headings and subheadings should express the theory persuasively and coherently. See Chapter 24 on developing a persuasive theory.

The **Table of Authorities** appears on the first page after the Table of Contents. It indexes the cases, statutes, constitutional provisions, court rules, administrative regulations, treatises, and law review articles cited in the Argument, together with references to the pages in the brief where each authority is cited. In the Table, every authority is listed in a complete citation conforming to citation rules.

The Table of Authorities can be divided by type of authority: "Cases," "Statutes," and "Miscellaneous." Cases are listed in alphabetical order. If constitutional provisions, court rules, or administrative regulations are cited, they are listed with statutes, and the heading is reworded to accommodate them. Under the heading, the citations appear in the following order: federal constitutional provisions, state constitutional provisions, federal statutes, state

2. In a criminal case, the accused is always the defendant — as in "Merritt Bresnahan, defendant." The prosecution's trial court procedural designation is implicit and never expressed. It would seem silly to write "People of the State of New York, Prosecution." Phrases like "State v. Bresnahan," "People v. Bresnahan," "Commonwealth v. Bresnahan," and "United States v. Bresnahan" unambiguously communicate that Bresnahan is being prosecuted by whatever government customarily uses the designation that precedes the "v."

statutes, court rules, federal administrative regulations, and state administrative regulations. "Miscellaneous" is reserved for secondary authority, such as restatements, treatises, law review articles, and other sources. They are usually listed there in that order.

The two Tables (sometimes called the "front matter") are typically paginated together in lowercase Roman numerals. The rest of the brief (the "body") is paginated separately with Arabic numbers, beginning with "1," on the first page after the Tables. This practice stems from a time before word processing when the body of the brief was typed before the tables. Now most word processors will automatically generate the tables if you set up the document correctly.

The **Provisions Involved** is the easiest part of the brief to draft. The title will vary, but it should include each type of authority you include: constitutional provisions, statutes, regulations, court rules or a combination of these. For example, if the appeal centers on a statute and two court rules, the title here would be "Statute and Court Rules Involved."

This is where the court can learn two things.

The first is a list of the enacted or adopted law (as opposed to precedent) that is *central* to the decision the court is asked to make. Not every provision that will be cited in the brief needs to be included here. A provision is central to the decision if the court cannot dispose of the appeal without interpreting its meaning. A procedural rule that provides for the type of motion made below is not central to the decision unless the parties disagree about the rule's meaning and the court has been asked to resolve the disagreement.

The second thing the court can learn from this part of the brief is either the precise wording of those relevant portions, or — if the relevant portions are extensive — an indication that they are reproduced in an appendix to the brief. If the material is complicated enough to warrant an appendix, the reference to it could read something like this:

> The following statutes and court rules are set out in the Appendix: Sections 362 and 363 of title I of the Bankruptcy Reform Act of 1978, *as amended,* 11 U.S.C. §§ 362, 363 (2000), together with Bankruptcy Rules 1002 and 1003.

On the other hand, if the provisions are short, this portion of the brief might be written in a manner somewhat like the following:

> The First Amendment to the United States Constitution provides, in pertinent part, as follows:
>
> > Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people . . . to petition the Government for a redress of grievances.

A reasonable editing of the relevant provisions aids the court. Be careful to indicate deletions, as you would with any other quote. See Chapter 22 on quoting.

The **Preliminary Statement (or Introduction)** briefly sets out the appeal's procedural posture by identifying the parties, listing the relevant

procedural events, and describing the order or judgment appealed from. The Preliminary Statement might also describe the reasoning of the court below, and identify the grounds on which the decision below is challenged on appeal. The point is to tell the court why the matter is before it, and to specify the type of decision the court will have to make. That can usually be done in less than a page.

Many lawyers use this part of the brief to introduce the court to their theory of the appeal as well as their motivating arguments. See Chapter 24 and the examples in Appendices G and H.

A persuasive **Question Presented (or Issue)** is explained in Chapter 31.

The **Statement of the Case** is explained in Chapter 25.

A **Summary of the Argument** condenses the argument into a few paragraphs — usually one paragraph per issue. Often, lawyers will outline the summary by starting with the point headings, and then rephrasing and building on them to give the court a clear overview of your position and how you will support it in the more detailed Argument section. Your theory of the appeal should be absolutely clear from the summary. In drafting the summary, think to yourself: If I had only ten minutes to describe why I should win this appeal, what would I say? What are the most essential parts of my argument? That's what goes in your summary.

The **Argument** (Chapter 26) provides the detailed legal analysis to support the conclusions you want the court to draw. Much like the Discussion of Authority in a memo, the Argument should be divided into sections resolving different aspects of the claim. Those sections should be indicated by point headings. Point headings are explained in Chapter 30.

Although some lawyers use the **Conclusion** to reargue and re-summarize the theory of the appeal, the better practice is to limit the conclusion to a very short reiteration of the relief desired, together with an unamplified identification of the ground on which the relief would be based. For example:

> For all the foregoing reasons, the order of the Circuit Court for Albemarle County should be affirmed on the ground that the complaint does not state a cause of action.

A judge should be able to find in the Conclusion exactly what you want the court to do. This is particularly important where there are cross-appeals:

> For the foregoing reasons, the District Court's order should be affirmed insofar as it enjoins enforcement of Glendale Ordinance 88162, and in all other respects the District Court's order should be reversed.

The **signature block** is similar to the signature block in a motion memorandum (see Chapter 28).

Every court has rules governing the contents of briefs and other submitted documents. The rules are designed to make briefs easier for judges to use, and judges understandably become exasperated when the rules are ignored. Egregious violations of court rules can result in the court's striking the brief — in financial penalties imposed on the lawyer, and even in dismissal of the appeal.

## §29.2 Writing the Appellate Brief

### §29.2.1 Developing a Theory of the Appeal

You might want to review Chapter 24 (Developing a Persuasive Theory) — but also think about these additional considerations when crafting a theory of the appeal.

First, as noted in Chapter 30 (Point Headings and Subheadings), most appeals are based on a theory that the court below has erred. So, if you are the appellant, your theory must reflect the reasons the error is reversible. If you want an affirmance, the theory should reflect the *absence* of reversible error.

Second, because appellate court decisions have greater precedential weight than trial court decisions, appellate courts are likely to be more concerned about the policy implications of their opinions. This is especially true in cases of first impression and those dealing with novel legal issues. Therefore, policy can play a larger role in an appellate theory than it might at the trial court.

Finally, a persuasive appellate theory incorporates the limitations on appellate review described in §29.4. An appellate court will reject a theory that would violate restrictions on the court's own power to act.

### §29.2.2 The Process of Writing a Brief

Before you begin to write, carefully review the record, do a significant amount of the research, and develop the basic shape of your theory.

Reviewing the record is more than merely reading it; study the record to identify potential reversible error by the trial court, and to find every fact that could be used either to prove error or to defend what the trial court did. Look for both kinds of facts — regardless of whom you represent. Favorable facts will be key to your argument, but your theory must also show the appellate court why and how the facts that favor your opponent should determine the outcome.

Just as a judge doesn't read a brief from beginning to end, neither does a lawyer write it that way. The Table of Contents and Table of Authorities are done last, after the rest of the brief has already been written[3] (otherwise, as you

3. Some word-processing programs allow you to tag headings and citations and automatically generate the Tables.

revise the brief, you will have to go back and change those parts.) The order in which the other parts are written differs from lawyer to lawyer and from appeal to appeal, because one lawyer's work habits aren't necessarily effective for someone else, and because an effective lawyer adapts to the individual task at hand. Moreover, the entire process is recursive, meaning that you may start one section, realize something and turn to another section, and then loop back. Eventually, you'll settle into a range of work habits that are effective for you, and your first brief is an opportunity to begin to define yourself in that way.

Many lawyers prefer to draft from an outline. Once the point headings outline the "bones" of the argument, the writer can fill in the "flesh" by taking notes or free-writing the material to be covered under each heading, and then expanding that to the Argument itself. A lawyer who takes this approach might draft the Statement of the Case after the Argument, since it is easier to see what facts are most important after the Argument is written. The Questions Presented would be written afterward, because the lawyer identifies the most determinative facts — the ones recited in the Questions — while working out the Argument and the Statement.

Other writers like to begin by defining the issues. Starting with the Questions Presented provides focus and direction as the writer develops the other sections. A lawyer who uses this model may write the Statement of the Case next, using it to work out the details of the theory of the appeal, and tackle the Argument section at the end, developing the headings to conform to the Questions Presented. Still others may start with the Statement of the Case as a way of testing out the facts and figuring out which are most significant.

**Start writing before you finish the research.** You might feel like you can't start writing until you finish all the research, but writing after some initial research can help you figure out more specifically what kind of cases you should be looking for. Open-ended research is inefficient. Research takes less time and effort if you know what you're looking for. Start writing as soon as you have enough research to know roughly what your theory will be. You may want to make a case chart or matrix, as illustrated in Chapter 9, §9.6.3. This will show you the gaps in your authority. It will also help you start drafting the Argument. Because writing and thinking are inseparable, the act of writing will show you where you need more authority. When you go back into research, you'll focus more sharply on what you really need.

**Take a break periodically to put the brief out of your thoughts.** Come back to it in a frame of mind that enables you to put yourself in the judge's position: If you were a skeptical judge, would you be persuaded?

**Start practicing oral argument while you're writing the brief.** It might seem illogical to spend time on oral argument when you're up against a closer

deadline with the brief. But many lawyers discover that when they begin to practice their argument, they discover new aspects of the case and see logical or research gaps that they didn't see before. Many people learn not just by reading and listening, but also by talking and doing. The real reason for practicing oral argument early is to help you write a better brief.

Suppose you disregard this advice. You submit your final draft brief, rest for a few days, and then start developing an oral argument. As you practice, you come up with some terrific wording, and you wish you could put it in the brief — but it's too late.

Set up a schedule with a series of deadlines. Start from the date on which the brief is due. Allow at least a day or two for editing and proofreading at the end. Figure out how long it will take to turn a second or third draft into a final draft and so on, working your way backward in time to deadlines where each draft must be finished, and, for the first draft, when each component must be done. Writing a brief is a big job, and writing it in the time available requires self-discipline.

**Think of brief-writing as a collection of small tasks, rather than as one huge task.** A huge task can be frightening. But a lot of small tasks can be organized and then done one by one. You haven't been given one big assignment. You've been given several smaller ones: a Question Presented, a Statement of Facts, and so on. You can write all these things separately — as separate files, if you prefer — and then combine them into a single document. Even the Argument can become two or more smaller jobs. If you have two points, writing each of them is a separate task. But be careful to coordinate all these smaller tasks, so that the eventual brief becomes coherent and internally consistent.

## §29.3 Handling the Standard of Review and the Procedural Posture Below

To prevail, the appellant must demonstrate that the appropriate *standard of review* has been violated. The standard of review will vary from one kind of appeal to another. Think about a referee or line judge who reviews a videotape to see whether the other line judge made the right call on a sports play. That is akin to what appeals courts do in most cases.

How much error does it take to cause reversal? That depends on the appellate court and the procedural posture below. The appellate court matters because standards of review differ somewhat from one court to another. The procedural posture matters because different standards are applied to different rulings by the court below. Lawyers who don't take the correct standard of review into account make the court's job more difficult.

Many trial court rulings — such as orders dismissing pleadings, summary judgments, directed verdicts, jury instructions, and judgments notwithstanding the verdict — are evaluated on appeal "de novo." De novo review means the appellate court asks itself whether it would have done what the trial court did. It gives the trial court no deference. The appellate court can do that because all of these rulings present pure questions *of law.* They can be decided just as well on the written appellate record as by the trial court below, so the judges can substitute their own judgment for that of the trial court.

Other types of decisions — the trial court's determination of witness credibility at a trial, for example — will be reversed only if "clearly erroneous."[4] With "clearly erroneous," the appellate court defers significantly to the trial judge, because the trial judge was there to see the witness testify, whereas the appeals court has only the written record.

And on an issue where the lower court has *discretion,* the result below will be reversed only for an "abuse of discretion," which, again, represents a degree of deference to the trial court. A trial court has a wide range of discretion on issues of equity and concerning management of the progress of the litigation, such as rulings on discovery motions and on the conduct of the trial.

Many law school appellate advocacy assignments involve de novo standards of review. If that's true of your assignment, you probably will not have much difficulty arguing within the standard properly. You do not have to specifically identify what the trial court did wrong; you can argue directly about the outcome the law requires.

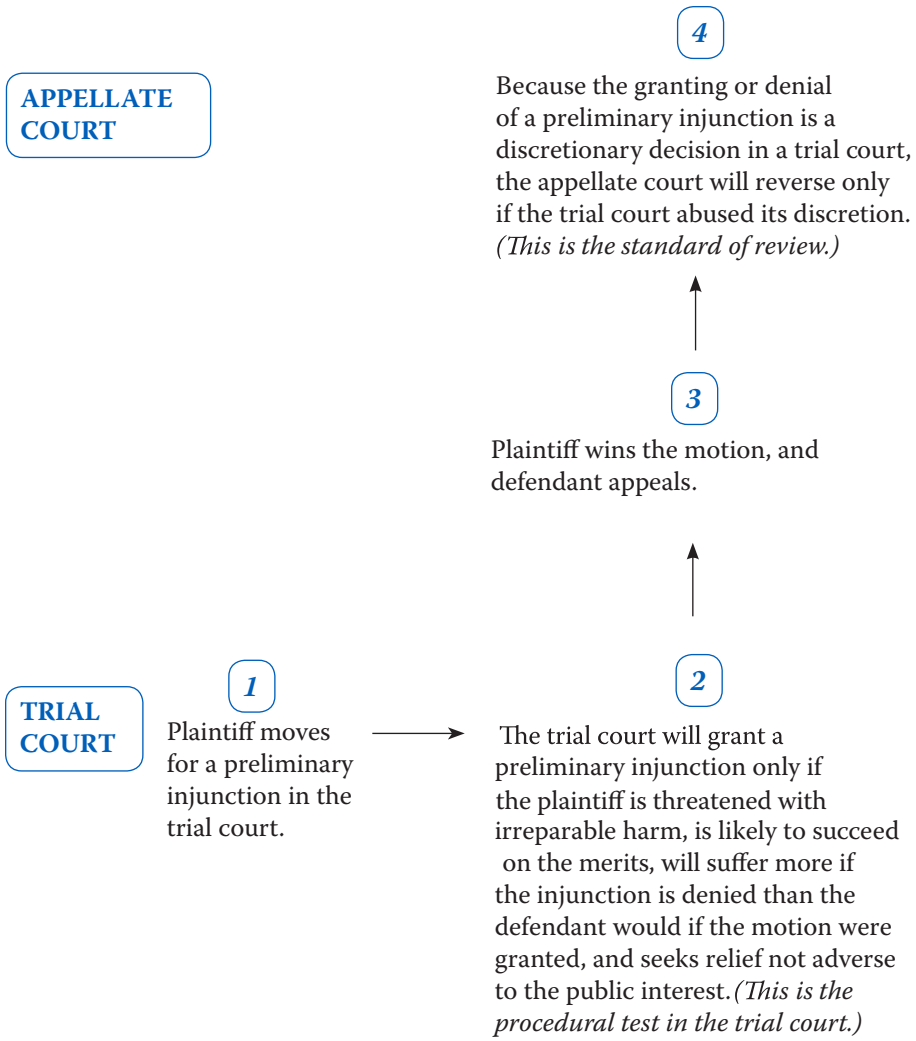
The only way to find out which standard controls a given appellate issue is to research local law in the same manner that you would research rules governing the procedural posture in a trial court. Look for authority that tells you not only what the standard is, but also what it means and how it works. Where a court mentions the standard of review in a decision, it usually does so immediately after reciting the facts and immediately before beginning the legal analysis. This is an example of the type of language you'll find:

> A dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12 is a ruling on a question of law and as such is reviewed de novo. [Citation omitted.] Review is limited to the contents of the complaint.

Here we learn what the standard is ("de novo"), and we learn a little — but certainly not everything — about how the standard operates. ("Review is limited to the contents of the complaint.") The more complex the standard of review, the more the court will have to say about it.

This diagram illustrates how standards of review work and how they are related to procedural tests in trial courts. (Read the diagram *from the bottom up*.)

4. *See, e.g.,* Rule 52(a) of the Federal Rules of Civil Procedure.


APPELLATE COURT
4
Because the granting or denial of a preliminary injunction is a discretionary decision in a trial court, the appellate court will reverse only if the trial court abused its discretion. (This is the standard of review.)
3
Plaintiff wins the motion, and defendant appeals.
TRIAL COURT
1
Plaintiff moves for a preliminary injunction in the trial court.
2
The trial court will grant a preliminary injunction only if the plaintiff is threatened with irreparable harm, is likely to succeed on the merits, will suffer more if the injunction is denied than the defendant would if the motion were granted, and seeks relief not adverse to the public interest. (This is the procedural test in the trial court.)

How do you handle the standard of review in a brief? Do three things:

First, set out the relevant standard of review at or near the beginning of the Argument section of the brief (or, if you have more than one point, each point's standard of review can be set out shortly after the point heading). While doing so, identify the procedural posture below and invoke the procedural test that governs it. And — if it can be done succinctly — tell the court how the standard was violated (if you are the appellant) or how it was not (if you are the appellee). For example, from an appellant's brief:

> This is an appeal from a summary judgment, which is reviewed de novo in this court. [Citation omitted.] Summary judgment should occur only where there is no genuine issue as to any material fact and the movant is entitled to

> judgment as a matter of law. [Citation omitted.] In this case, the movant was not entitled to judgment as a matter of law.

This passage tells us that the standard is de novo, and that the appellant's theory of error is that the second element of the test for summary judgment wasn't satisfied. (The writer doesn't say that there was a genuine dispute as to a material fact. Thus, only one element of the summary judgment test is at issue.)

In an appellate brief, a good place to address the standard of review is between a point heading and the first subheading. Cite to authority to prove the procedural rule that governed the trial court and the standard of review on appeal. Unless the law is unclear, a conclusory proof is usually sufficient because these rules are the type with which an appellate court would be routinely familiar. (Notice how this is handled in the Appendix G and H briefs.)

Frame your legal arguments in terms of the standard of review, unless that standard is de novo. If, for example, you're appealing from a decision committed to a trial court's discretion, show throughout rule application (Chapter 11) that the trial court abused its discretion. If you are the appellee in such a case, show the opposite. It's not enough merely to state the standard of review at the beginning and then ignore it for the rest of the Argument. Instead, use the standard of review and corollary rules wherever they are relevant, weaving the substantive and procedural law together to show either error (if you seek reversal) or the absence of it (if you urge affirmance).

A de novo standard need not be referred to throughout the Argument, unless the very neutrality of the de novo standard helps your case. Because the de novo standard grants no deference at all to the trial court, arguments can be based entirely on the substantive law once the court has been told that a de novo standard is in effect.

Throughout the brief (and in oral argument), describe the facts just as they were in the procedural posture in the trial court. (That's because the standard of review is geared to the procedural posture below.) If the appeal is from the dismissal of a complaint, for example, describe the facts as allegations ("the complaint alleges that the defendant struck the plaintiff"). Describe them as evidence ("Smith testified that the defendant struck the plaintiff") if the appeal is from a judgment resulting from a motion challenging the quality of evidence. But if the facts are undisputed, describe the facts as truth ("it is undisputed that the defendant struck the plaintiff").

If you are unsure of how to do any of these things, take a look at several opinions in which the court for which you are writing has used the same standard of review in appeals from the same procedural posture involved in your case. Chances are that you'll see them invoked near the beginning of the opinion and used at logically appropriate spots thereafter. Look for a definition of the standard, try to learn its relationship to other procedural rules, and get a feel for the court's expectations about how the standard should be used.

## §29.4 Limitations on Appellate Review

Appellate courts will reverse an order or judgment only if it's based on *reversible error.* An appellate court will affirm, unless the appellant can point to a specific error by the trial court that the law considers ground for reversal. In the absence of reversible error, an appellate court must affirm what the trial court did, even if the result below seems unfortunate. That's because an appeal is only a review for the kind of mistake the law categorizes as error. Similarly, the appellate court must affirm, even if it identifies an error, if that error didn't cause the order or judgment from which it was appealed. Even if the result below was unfortunate, and even if the court below committed error, an appellate court will reverse only if the result below is traceable to the error. Error that affected the result below is called *material* or *prejudicial.* Error without such an effect is called *harmless.*

To identify error, and to figure out whether it was material or harmless, start with the procedural posture in the trial court. For example, assume that the plaintiff has requested a particular jury instruction; that the trial court denied the request and instead gave another instruction; that the jury returned a verdict for the defendant; and that, on the basis of the verdict, the trial judge entered a judgment for the defendant. The issue on appeal cannot be whether the plaintiff should have won below; rather, it is whether the trial court's instruction was so erroneous that the entire case should be tried again to a jury that is properly instructed. If the instruction was error, but if the record shows that the error was not so material as to lead the jury astray, the error was harmless and won't cause reversal. The error would be harmless, for example, if the evidence in support of the verdict was so overwhelming that a properly instructed jury would have returned the same verdict.

Appellate review is limited to issues that are actually *raised on appeal.* An appellate court doesn't survey the record below looking for error; in the adversary system, that's the job of the appellant's lawyer.

Appellate courts generally refuse to consider facts that don't appear in the trial court's record (also called the *record below*). You can determine whether a fact is in the record by focusing on the procedural posture in the trial court. If the order being appealed from is one dismissing a complaint for failure to state a cause of action, a fact is in the record if it's alleged in the complaint. That's because, for the purpose of deciding a motion to dismiss a complaint, all facts properly pleaded are treated as though they could be proved later at trial. (And, of course, on such a motion, the only factual record before the trial court is the complaint itself.)

But the situation is different where the motion in the trial court has challenged a party's evidence rather than allegations. For example, assume that the appeal is from a summary judgment. If a fact appears as an allegation in a pleading but doesn't appear in any evidentiary form, it's not "a fact in the record," because the motion below tested evidence and not allegations.

There are two exceptions to the rule against considering facts outside the record. One involves the doctrine of judicial notice, through which a court — trial or appellate — will, without evidence, accept as proven certain facts that are beyond dispute. Do not make more of this than it really is. The following are examples of the kinds of indisputable facts of which courts will take judicial notice: A meter equals 39.37 inches. Cleveland is in Cuyahoga County, Ohio. October 11, 2019, was a Friday.

The other exception is for what are called "legislative facts"' which are generalized social, economic, or scientific information that guides a court in the development of law — as opposed to the "case facts" or "adjudicatory facts," which are the specific events that transpired between the parties. Legislative facts can include empirical data on the detrimental effects of racial segregation, or on the national deterioration of groundwater quality, or on the ways consumers use smartphones — all useful in determining public policy. Although the adversary system isn't very efficient at collecting legislative facts, appellate courts need these facts when making or changing law.

Although legislative facts can be placed in the trial record, a lawyer called in to handle an appeal sometimes needs to put before the appellate court legislative facts that were not developed in the record below. The appellate lawyer might include in the brief published empirical research that complements, but does not crowd out, the legal analysis that is the core of argument. Empirical material added on appeal doesn't need to be set out in the Statement of the Case because it's not part of the record below. Rather, it appears, with citations, in the Argument, most often in support of policy contentions.

# 30 Point Headings and Subheadings

## §30.1 How Points and Headings Work

In a motion memo or appellate brief, the Argument sections are indicated by point headings. The point headings use special formatting, such as capitalization and underlining, to set off the major arguments or points in your brief. To see what point headings look like, please quickly review the Table of Contents in the briefs in Appendices G and H.

The point headings in a motion memo or brief are rhetorically important for several reasons. First, by providing clear stopping points, they "chunk" information and provide the reader with a signal of what is coming. Second, they provide visual cues about your organization through format emphasis (italics, capitals). Usually, format emphasis, such as capitals and italics, is discouraged in persuasive writing as the last resort of a poor writer without the rhetorical skill to emphasize through vocabulary. But format emphasis in point headings helps the reader see how a section fits into the Argument. Finally, the headings "prime" the reader. Because the reader sees the argument in your heading before she reads the text that follows, she will view the text that follows through the lens of the argument in that heading.

Because of their rhetorical importance, you can win or lose an argument based on your point headings. Drafting point headings require that you think carefully about *organization* and *language*.

## §30.2 The Basics

Headings have different levels. Point headings are indicated by Roman numerals (I, II, III), and subheadings by capital letters (A, B, C). You should check your local rules for how to format headings — what kind of capitalization to use (all caps, title case) or other format (underline, italics). If your local rules are silent, look at some winning briefs filed in that court and follow that format.

A point heading generally indicates an independent, complete, and free-standing ground for a ruling in your favor. In other words, if the court accepts the premise in the point heading, you win. If it doesn't, you lose.

You might have only one point heading, depending on the nature of the case. For example, in a tort case a plaintiff will likely have only one point heading (alleging negligence) because he or she must prove *all four* elements of the claim (duty, breach, causation, and damages) to succeed. But the defendant in that same case might have two-, three-, or four-point headings, depending on which elements the defendant is challenging. The defendant can pick — for example, arguing all four elements if there are good arguments to be made on all of them, or arguing only on the elements where the plaintiff's case is weak.

If a case has multiple causes of action, each claim should have a separate point heading, although this is not a bright-line rule. Some cases present exceptions. For example, if a case is very complicated, you can have multiple major headings, even if they are not all independent grounds for relief. Sometimes local rules or practice conventions require a major heading for explaining the procedural standard (e.g., the grounds for summary judgment, or motion to dismiss). You should discuss with your professor whether your case presents such an exception.

Subheadings (A, B, C) underneath a point heading are arguments showing why the point heading is true. If a subpoint is especially complicated, a further level of subdivision can be indicated with Arabic-numbered headings (1 and 2, for example). In very simple form:

**I. My Client Wins Because [independent ground for relief].**

*A. Reason/Argument A why point I is true.*

*B. Reason/Argument B why point I is true.*

1. Reason/Argument 1 why B is true.
2. Reason/Argument 2 why B is true.

Here's a good example:

> **I. Glitterati Casino's Motion for Summary Judgment Should Be Denied Because the Policy Violates Title VII's Prohibition Against Sex Discrimination by Requiring Female, but Not Male, Employees to Wear Makeup and Elaborately Styled Hair.**
>
> *A. The Casino's Policy Inflicts Demeaning Stereotypes of Women in Their Professional Roles in Violation of Title VII.*
>
> 1. The Casino's Policy Sexually Stereotypes Women Employees as Primarily Valuable for Their Looks, Not Their Competence.
> 2. The Casino's Policy Encourages Customers to Sexualize and Harass Female Employees.
>
> *B. The Casino's Policy Violates Title VII Because It Is More Costly, Time-Consuming, and Restrictive for Women Than for Men.*

Between the "I" point heading and the "A" subheading, there should be an introduction that includes a mini-roadmap setting up headings A and B. The reader should be able to see your theory of the case clearly from this introduction. In the example above, the "A" subpoint is especially complicated, and is subdivided with the "1" and "2" headings. Between the "A" heading and the "1" heading should be a mini-roadmap setting up headings "1" and "2."

Here are a few more basic format pointers:

Headings in briefs generally are *full sentences* with periods at the end. They are not topical headings like "Reasonableness" or "Negligence." They are persuasive assertions.

If you make the decision to break a bigger point (a "I" or an "A" or "B") into subheadings, that decision signals to the reader that the argument has more than one part. Therefore, if you have an A, you must have a B; if you have a 1, you must have a 2. (But, for reasons discussed above, sometimes it is acceptable to have only one point heading, and thus acceptable to have a I without a II.).

Relatedly, if you decide to break a point heading into subheadings, you should insert an introductory section in between to "set up" the headings below with a roadmap. See the example above. The introductory section between a Roman numeral and the first minor heading (I and A or II and A) traditionally explains the law and pushes the theory of the case on that issue. Chapter 24 explains the concept of a theory of the case.

The point headings (I, II) should make clear the relief requested. In an appellate brief, point headings should reflect the standard of review (see Chapter 29). In a motion memo, the requested relief should be clear in all point headings (e.g., "Plaintiff Is Entitled to Summary Judgment Because . . ." or "Plaintiff's Motion for Summary Judgment Should Be Denied Because . . ."). This will help you make sure that your major headings are stand-alone grounds for relief!

All headings are single-spaced. In the Argument, they are indented and set apart spatially from the rest of the argument. As noted above, check your local rules for any guidelines about format for headings — but keep in mind that headings and subheadings should jump out to a reader who is skimming.

Be careful about the results of your word-processing software's widow/orphan function. If you have only an inch or two left at the bottom of a page in the Argument, don't put a heading there; instead, put it at the top of the next page.

## §30.3 The Process of Creating Point Headings: Brainstorming Arguments

Once you have your point headings and have decided on an initial organization, it is time to think about what we call "the why." Why should the court accept the propositions in your point headings? Let's start with our very rough point heading: "I. Glitterati Casino's Policy Violates Title VII Because It Discriminates on the Basis of Sex." This is not an effective heading because it is so generic; except for the names of the parties, it could be the point heading in any sex discrimination case. What makes your headings compelling (and distinguishable from other cases in the same legal area) are your facts. Those facts tell your reader what the case is about and provide an emotional and legal anchor for why you should prevail.

So, for your point heading, ask yourself, "What are my best facts that show that Glitterati Casino's policy discriminates?" These should be the facts that broadcast your theory of the case (see Chapter 24 about persuasive theories). You don't want to cram too many facts into the heading; instead, you want to choose facts that give a general overview of your theory of the case.

All headings should address "the why." Ask yourself: "What reasons can I give to convince the court to accept my premise?" Again, brainstorm arguments. The reasons why your point heading I is true are the subheadings under it. They can be the elements or factors that comprise the law behind the point heading. For example, if your point heading asserts that the defendant was negligent, your subheadings might be these: the defendant had a duty; the defendant breached that duty; the defendant's breach proximately caused the plaintiff's injuries; and the plaintiff sustained damages. Or they might be different arguments about the legal standard, like subheadings A and B in the example earlier in this chapter. Or they might state a policy argument, or an argument about what the legal standard should be. One of the most challenging parts of brief writing is deciding what arguments will be in the headings.

You might start out with many headings and subheadings. This is fine because it helps you organize your thoughts. But be flexible about eliminating headings if need be. Not every argument needs to be a heading. On the other hand, you'll want to give your reader rest points in your text. Remember that headings help "chunk" information for the reader so that he or she gets the information in digestible amounts. A good rule is that a heading should have at least two or three paragraphs of text beneath it. If it has less, perhaps

consider eliminating or combining headings. If it has many more than three or four paragraphs, consider breaking it up with minor headings or subheadings.

## §30.4 The Importance of Facts

All the headings, from the point headings down to the subheadings, should include facts from your case. This is what gives your headings power. It is part of the "why." The point headings, as discussed above, should include a broad factual "because" statement that showcases your overall theory of the case.

The subheadings should also contain facts to show the reader why your subheadings are compelling. In the headings, the facts should be legally relevant but also have a visceral, emotional appeal. The court will often read the headings before reading any of the text, or even before reading any other part of the brief. Don't assume the court knows the facts or the law. That means the headings have to use the facts to give the reader an intuitive feeling of rightness.

Look at the headings in the example earlier in this chapter. Also consider this example from a brief about a Fourth Amendment search. You do not need to know the nuances of Fourth Amendment law to know this conduct sounds unreasonable:

> *A. By Executing the Search Warrant in The Middle of the Night for No Good Reason, the Police Acted Unreasonably, Thereby Violating the Fourth Amendment*

## §30.5 How to Evaluate Your Headings for Effectiveness

To figure out whether you have drafted effective point headings and subheadings, ask yourself the following questions.

**30-A** **Do your headings lay out a complete and persuasive outline of your Argument? Do they convey your theory?** Even if a Table of Contents is not required in the document you are drafting, you should create one so that you can look at your headings without the text beneath them. Doing this is an essential part of the editing process. You might find gaps or inconsistencies, or you might find repetition or other areas that need redrafting.

**30-B** **Is each point heading an independent ground for a ruling in your favor?** Ask yourself, "If the court accepts this premise, will I win the case? If the court does not accept it, will I lose the case?"

**30-C** **Do your headings persuade a judge who is unfamiliar with the facts and law in your case?** Do your headings have an intuitive appeal to a reader without any knowledge of the case?

**30-D** **Is each point heading and subheading a single sentence that can be immediately understood?** Conciseness in headings is the key to their persuasive strength. If you find yourself overstuffing your headings, consider subheadings! For example, here is *an overstuffed heading*:

> **Because this state's shield law provides no explicit protection for the media against revealing nonconfidential information or sources, and because the legislative history is silent, the scope of art. 9, § 765 is limited to protecting only confidential information or sources, and this court should therefore enforce a subpoena that sought information that the movant, a newspaper reporter, had obtained through conversations in which he had not promised to keep his informants' identities in confidence.**

Here is an example of *better headings*:

> **I. The deposition subpoena should be enforced because the evidence sought is not confidential and is therefore not protected by this state's media shield law.**
>
> *A. Art. 9, § 765 permits a litigant to obtain information that the media has not treated as confidential.*
>
> *B. The appellant journalist concedes that he did not promise confidentiality to his sources.*

**30-E** **Does each point heading identify the relief you want?**

**30-F** **Do your headings combine law and fact to state your argument?**

**30-G** **Are your headings forceful and argumentative?** Your point headings and subheadings should state your contentions from your client's point of view. Ideally, they should be something with which the other side would disagree.

**30-H** **Does the text beneath the heading support the premise stated in the heading?** Finally, check that what you have written beneath the heading supports the heading, and that you haven't let your writing wander into other arguments or points irrelevant to the heading. If asked, you should be able to articulate clearly how every sentence and paragraph beneath a heading supports the premise in that heading.

# 31 Questions Presented

## §31.1 Introduction

A Question Presented has several purposes. First, it defines the legal issue before the court. Second, it clarifies the relief the court is being asked to grant. And third, within limits, it persuades by framing the issue from your client's point of view. In some courts, the Questions Presented section of a brief is called a Statement of Issues. We say "Question(s) Presented" in this chapter because it is the more commonly used term. Statement of Issues appears in the briefs in Appendices G and H because that is the term used in the court in which those briefs were filed. The two terms mean the same thing; a Question Presented is an appellate Issue. You should use the term that is acceptable in the court where your brief will be filed.

A Question Presented is made up of (1) an explicit or implicit reference to the controlling rule of law, (2) a precise legal question, and (3) a short list of the determinative facts that arguably affect the outcome:

> Has the seller of an acoustical keyboard breached the implied warranty of fitness for a particular purpose where the purchaser was injured when the keyboard exploded the first time it was plugged in?

Here, the controlling rule is the implied warranty of fitness for a particular purpose found in § 2-315 of the Uniform Commercial Code. The legal question is whether a keyboard seller is liable. The critical fact is that the keyboard

exploded the first time the purchaser plugged it in. All this adds up to the question "presented" by the situation.

The Question Presented above is persuasive as well as informative. The reader feels immediately curious about what happened, as well as sympathy for the plaintiff. Why would a seller *not* be liable in these circumstances?

Under § 2-315, if the seller had reason to know of any particular purpose for which purchasers like the plaintiff buy its keyboards, and if the plaintiff relied on the seller's skill or judgment, a court will hold that the seller impliedly warrantied that the keyboard was fit for that purpose. What if the plaintiff is a musician who performs in front of live audiences with dramatic fire and water stage effects? What if the seller had never heard of the plaintiff and had also never heard of anybody using one of its keyboards that way? The seller's Question Presented might then read something like this:

> Should this Court refuse to find an implied warranty of fitness for a particular purpose where the seller did not know that the plaintiff musician intended to expose the keyboard to water as part of his stage performances?

Notice how this Question Presented is different, even though it's in the same case. It contains the controlling law and legal question, but a different and arguably more determinative fact. Reading these Questions together, it appears the case is likely to turn on what the seller knew at the time of sale.

## §31.2 Four Ways of Structuring a Question Presented

A Question Presented can be structured in four different ways. Each of them works better in some situations than in others.

***Beginning with the verb (or part of the verb)*:** The following Questions Presented begin like the kind of question you're used to asking every day:

> Has the seller of an acoustical keyboard breached the implied warranty of fitness for a particular purpose where the purchaser was injured when the keyboard exploded the first time it was plugged in?
>
> Should this Court refuse to imply a warranty of fitness for a particular purpose where the seller did not know that the plaintiff musician intended to expose the keyboard to water as part of his stage performances?

The question can begin with whatever verb is most appropriate to the issue:

> Does the First Amendment allow . . .?
>
> Did the defendant newspaper give publicity to private facts . . .?

***Beginning with "Under":*** These Questions refer to the controlling rule before asking how it applies to the determinative facts:

> Under § 403 of the Traffic Code, is a driver guilty of failure to stop at a stop sign where the stop sign was hidden behind tree branches that the county highway department had failed to prune?

This structure works especially well with statutory issues. But it doesn't work well when the controlling rule of law is more widely known by its name ("the implied warranty of fitness for a particular purpose") than by its statutory section number ("§ 2-315"). Compare these:

> Under § 2-315 of the Maryland Uniform Commercial Code, is the seller of an acoustical keyboard liable to a purchaser who was injured when the keyboard exploded the first time it was plugged in?
>
> Has the seller of an acoustical keyboard breached the implied warranty of fitness for a particular purpose where the purchaser was injured when the keyboard exploded the first time it was plugged in?

Many judges know about the implied warranty of fitness for a particular purpose. But few of them can remember its section number.

***Beginning with "Whether":*** A Question Presented can begin with the word *Whether*, even though the result isn't a grammatically complete sentence:

> Whether the seller of an acoustical keyboard breached the implied warranty of fitness for a particular purpose where the purchaser was injured when the keyboard exploded the first time it was plugged in?

This structure is used by many lawyers — and in some states by most lawyers. But it's often criticized. If the same word begins most of the Questions a judge reads, few of those Questions will seem memorable. *Whether*-type Questions, however, are widely used, and you should structure your Questions this way if it is preferred by your teacher or supervisor.

***Reciting the determinative facts in complete sentences and then stating the issue, as a question, in a separate sentence:*** In some cases, the determinative facts are so complex that they can't be reduced to a short list. That tends to happen where a set of determinative facts raises several independent issues, or where the facts themselves are difficult to describe concisely. In such cases, lawyers sometimes use a different format, expressing the determinative facts in complete sentences and then posing the issue in a final sentence. Think of this as the "multiple sentences" format. For example:

> This case involves the diversion of water from the Three Pines Wilderness Area. Plaintiff American Environmental Association was formed for the purpose of preserving wilderness areas like Three Pines. Some of its members who live nearby use Three Pines for weekend recreation while others visit it on annual camping trips. Like other visitors, they depend on a plentiful supply of water within the wilderness area. The issue on this appeal is whether the Association has standing to sue to enjoin the existing and threatened diversions.[1]

For comparison, here's the same issue expressed in a single sentence, using the beginning-with-the-verb format:

> Does the American Environmental Association have standing to sue to enjoin existing and threatened diversions of water from the Three Pines Wilderness Area where the Association was formed for the purpose of preserving wilderness areas like Three Pines; some of its members who live nearby use Three Pines for weekend recreation while others visit it on annual camping trips; and, like other visitors, they depend on a plentiful supply of water within the wilderness area.

Which did you find easier to read?

Normally, you should use one of the other formats. Use this one — the multiple-sentences format — only when the other formats produce sentences so complicated that a reader has to read them two or three times to understand them.

## §31.3 Writing an Effective Question Presented

First, write out the basic legal issue ("Is a seller liable?" "Did police violate the Fourth Amendment?" "Does Ohio recognize a cause of action for . . .?" "Under § 403 of the Traffic Code, . . .?").

Second, make a list of the most determinative facts, omitting those that are merely explanatory or coincidental (see Chapter 10, §10.2). While writing and rewriting your motion memo or brief, you'll tinker with this list by adding or subtracting facts as you come to understand the issue better, and you'll gradually refine the list's wording as you learn the possibilities and limitations of each fact. But you can't begin to write a Question Presented without a list of determinative facts.

Third, choose a structure. Be prepared to change it later if it doesn't work out. Fill out the structure by combining the most determinative facts with the legal issue to form a single sentence.

Finally, review your Question Presented for effectiveness, using the criteria in the next section of this chapter. You might need to do this several times.

1. Girvan Peck, *Writing Persuasive Briefs* 102-03 (1984).

Given its complexity and conciseness, the Question Presented is often the last part of a document to reach its final form.

## §31.4 How to Evaluate Your Questions Presented for Persuasiveness

To figure out whether you've written an effective Question Presented, ask yourself the following questions.

**31-A** **Have you kept the Question concise?** Trim the Question so that it contains as concise a summary of the law, the legal issue, and the determinative facts as possible. Your reader should be able to digest it quickly on the first read.

**31-B** **Have you referred to or implied the controlling law and legal issue?** The controlling law can be explicit or implicit, and the specificity required varies. For example, in a case involving the Fourth Amendment alone, it might be adequate to say, "Did the officers have reasonable, articulable suspicion to stop the suspect when . . .?" But if the case involves a number of unrelated issues, it might be necessary to say, "Did the officers have reasonable, articulable suspicion under the Fourth Amendment to the U.S. Constitution to stop the suspect when . . .?"

**31-C** **Have you listed the facts in a way the reader can easily understand?** Facts that don't fit into the inquiry can be attached at the end of the Question in clauses that begin with "where" or "when." This example is from a different kind of acoustical keyboard case:

> Is the seller of an acoustical keyboard absolved of liability under an implied warranty of fitness for a particular purpose where an ordinary consumer bought it in pieces from a street vendor and attempted to reassemble it himself even though the words "Do Not Open or Attempt to Repair This Product" were engraved on the outside?

The legal issue — the inquiry — is best placed near the beginning of a Question Presented because a list of determinative facts makes little sense until the reader knows the issue to which the facts relate. The following, for example, are not easy to understand:

*Facts before inquiry*: Where an ordinary consumer bought an acoustical keyboard in pieces from a street vendor and attempted to reassemble it himself, even though the words "Do Not Open or Attempt to Repair

This Product" were engraved on the outside, is the seller absolved of liability under an implied warranty of fitness for a particular purpose?

*Facts and inquiry intermingled*: Is the seller of an acoustical keyboard, which was bought from a street vendor by an ordinary consumer who attempted to reassemble it himself, even though the words "Do Not Open or Attempt to Repair This Product" were engraved on the outside, absolved of liability under an implied warranty of fitness for a particular purpose?

**31-D** **Have you stated the Question from your point of view suggesting a positive answer?** Stating the Question from your point of view means stating it in a way that favors your client in both a legal sense and an emotional sense. For example, a state prosecutor would want to admit incriminating evidence and convict the defendant, but the defendant would want to exclude illegally obtained evidence and be acquitted. Stating the question so that it elicits a "yes" answer helps you state it from your point of view and is less confusing to the reader.

At the beginning of this chapter, the two "exploding keyboard" Questions are completely different. But both ask a question to be answered in the affirmative:

> Has the seller of an acoustical keyboard breached . . .?
>
> Should this Court refuse to find . . .?

Because judges are inclined to think you want a positive response to your Question, avoid drafting Questions where the answer you want is "no." That will only confuse your reader.

Avoid using double negatives:

> Was the officer's conduct not unreasonable when . . .?
>
> Is a seller not liable where it does not . . .?

Double negatives are almost always confusing. They're very common in first drafts as you work with typical legal phrasing, but can easily be removed to improve clarity and readability:

> Was the officer's conduct reasonable when . . .?
>
> Is a seller absolved of liability where it . . .?

**31-E** **Have you avoided begging the question?** Don't ask a question in which the "facts" are really assumed conclusions of law. For example, under the Fourth Amendment to the U.S. Constitution, evidence is

admissible in a criminal trial if the police seized it while stopping a defendant based on reasonable and articulable suspicion. The case law defines "reasonable and articulable suspicion" as reason to know the defendant was about to engage in criminal activity. This Question Presented begs the question:

> Did the officer have reasonable and articulable suspicion to stop the defendant when the officer had reason to believe the defendant was about to engage in criminal activity?

The answer to this Question *must* be yes, but that's because a reason to believe the defendant was about to engage in criminal activity is *always* reasonable and articulable suspicion. Thus, "the officer had reason to believe the defendant was about to engage in criminal activity" is a conclusion of law masquerading as a fact.

Remove the conclusion of law and replace it with real facts that suggest the reasonableness of the officer's suspicion. Let the facts speak for themselves:

> Did the officer have reasonable and articulable suspicion to stop the defendant when the defendant paced in front of a closed liquor store for 20 minutes, kept checking his cell phone, and kept one hand in his coat pocket at all times?

**31-F** **Have you presented the law in a balanced way?** When phrasing the legal question, you can state it from your point of view, but you can't distort the law. For example, several factors are used to determine whether a defendant was in custody when he was interrogated. The following Question doesn't present the issue before the court in a balanced way:

> Did the trial court err in excluding the defendant's confession on the ground that he was in custody when the defendant was repeatedly told he was free to leave the interrogation?

The writer has included the one fact most favorable to the prosecution in a way that suggests the only factor relevant to the custody determination is what the police told the defendant. But that's a distortion of the law. The Question below accurately conveys the complexity of the issue before the court:

> Did the trial court err in excluding the defendant's confession on the ground that he was in custody when the defendant was questioned for 30 minutes in a police interview room by a uniformed, unarmed officer, but repeatedly told he was free to leave the interrogation?

Although some of these facts are unfavorable from the prosecutor's perspective, this is a more honest representation of the Question Presented. It also gives the prosecutor a chance to characterize the unfavorable facts and work them into the theory of the case.

**31-G** **Have you included all determinative facts without exaggerating them?** Include all facts likely to be determinative, both favorable and unfavorable. Don't exaggerate or stretch the facts to your benefit. Does the following Question sound like an exaggeration of the facts?

> Is it in the best interest of a child to terminate her mother's parental rights when the mother barely knows her own daughter?

It may sound fair, but once you learn that the mother is in a rehabilitation hospital following a severe car accident and has been unable to communicate with her daughter for three months, it no longer seems accurate to say the mother "barely knows her."

**31-H** **Do you sound strident or overly dramatic, risking your credibility?** Lawyers should be zealous advocates. But don't sound strident, use belligerent language, or write sarcastically. Any of these will work against you. In the case of the exploding keyboard and the performing musician:

> How could a seller of an acoustical keyboard possibly be liable for such minimal injury to the plaintiff "musician," where the seller clearly had no idea that the plaintiff would expose the keyboard to water?

If the case were that one-sided, the plaintiff's lawyer would have settled it long ago. Adverbs like "possibly," and "clearly" don't increase the persuasiveness of the Question. They tend to have the opposite effect. Describing the plaintiff's injury as "minimal" sounds disrespectful, and there's no need for the defendant to characterize the harm. Finally, using quotation marks to suggest the plaintiff isn't much of a musician is unprofessional. A simpler, less emotionally charged Question is far more effective.

**31-I** **Have you referred to the parties in a clear way?** To a reader, the clearest references are generic ("a malpractice insurer," "a prisoner," "an employee," "a seller," etc.).

Procedural designations such as "Appellant" and "Appellee" are often confusing (and several courts have rules that prohibit using them). The same is true of "plaintiff" and "defendant," unless the issue is really procedural, or the Question itself makes clear what kind of plaintiff and what kind of defendant are involved. Although most uses of "plaintiff" and "defendant" are confusing, this isn't:

> Has a defendant been properly served when the summons was handed to him in a plain manila envelope?

A lawsuit begins when a defendant is served with a summons. This is a procedural issue, which you've probably studied in the course on Civil Procedure. What matters is the defendant's role *as a defendant.*

In a criminal case, it's never confusing to refer to one party as the "defendant." The other party is always the prosecution, although different terms are used in different jurisdictions: "the State," "the People," or (in federal courts) "the government." A Question Presented might use one of those terms. Or, if the issue is whether a prosecutor personally behaved properly, it might refer to the prosecutor: "the U.S. Attorney," for example.

Although a busy judge can be confused when the parties are referred to by name only, it may be tactically wise to try to personalize a party beset by some institutional opponent, if the context will make clear who is who.

## Exercise
## G.G. v. Gloucester County School Board

Appendices G and H contain briefs in *G.G. v. Gloucester County School Board,* filed in the U.S. Court of Appeals for the Fourth Circuit. Before doing this exercise, go to those appendices and read each brief's Statement of the Case.

The defendant School Board lost in the Fourth Circuit and filed a petition for certiorari in the U.S. Supreme Court. A petition for certiorari essentially asks for permission to appeal to the Supreme Court. About 5,000 to 8,000 certiorari petitions are filed each year, but the Court grants only about 70 of them.

In this exercise are the Statements of Issues or Questions Presented from

1. the plaintiff G.G.'s Fourth Circuit brief (Appendix G),
2. the defendant School Board's Fourth Circuit brief (Appendix H),
3. the School Board's certiorari petition in the Supreme Court, and
4. G.G.'s brief in opposition to the certiorari petition in the Supreme Court.

The Fourth Circuit briefs use the term *Statement of Issues*. The Supreme Court submissions use the term *Questions Presented*. The two terms mean the same thing. Use the term required by, or customary in, the court where you will file your brief.

**Evaluate the following Statements of Issues and the Questions Presented. For each one, what are its strengths and weaknesses?**

**1. Plaintiff G.G.'s Fourth Circuit brief (Appendix G) —**

**STATEMENT OF ISSUES**

1. Should G. be granted a preliminary injunction to allow him to resume using the boys' restrooms during the pendency of the case?
2. Should the court's dismissal of the Title IX claim be reversed?

**2. Defendant School Board's Fourth Circuit brief (Appendix H) —**

**STATEMENT OF ISSUES**

1. Whether the Fourteenth Amendment or Title IX requires the School Board to permit G.G., who was born and remains anatomically a female, to use the boys' restroom because G.G. identifies as a boy.
2. Should this Court affirm the District Court's denial of G.G.'s Motion for Preliminary Injunction?

**3. The School Board's certiorari petition in the Supreme Court —**

(The Supreme Court appeal focused on a deference issue under *Auer v. Robbins,* 519 U.S. 452 (1997), which isn't included in the excerpts in Appendices G and H.)

**QUESTIONS PRESENTED**

Title IX prohibits discrimination "on the basis of sex," 20 U.S.C. § 1681(a), while its implementing regulation permits "separate toilet, locker rooms, and shower facilities on the basis of sex," if the facilities are "comparable" for students of both sexes, 34 C.F.R. § 106.33. In this case, a Department of Education official opined in an unpublished letter that Title IX's prohibition of "sex" discrimination "include[s] gender identity," and that a funding recipient providing sex-separated facilities under the regulation "must generally treat transgender students consistent with their gender identity." App. 128a, 100a. The Fourth Circuit afforded this letter "controlling" deference under the doctrine of *Auer v. Robbins*, 519 U.S. 452 (1997). On remand, the district court entered a preliminary injunction requiring the petitioner school board to allow respondent — who was born a girl but identifies as a boy — to use the boys' restrooms at school.

The questions presented are:

1. Should this Court retain the *Auer* doctrine despite the objections of multiple Justices who have recently urged that it be reconsidered and overruled?
2. If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law, and was adopted in the context of the very dispute in which deference is sought?
3. With or without deference to the agency, should the Department's specific interpretation of Title IX and 34 C.F.R. § 106.33 be given effect?

**4. G.G.'s brief in opposition to the certiorari petition in the Supreme Court —**

**QUESTIONS PRESENTED**

1. Whether, in the absence of any "special justification," this Court should depart from stare decisis and overturn long-standing principles of administrative law embodied in *Auer v. Robbins*, 519 U.S. 452 (1997), and similar precedent dating back to 1945?
2. Whether *Auer* deference applies to an agency's interpretation of its own regulation when (a) that interpretation is articulated in an opinion letter, a statement of interest and an amicus brief, and (b) the interpretation is not a post hoc justification to defend an agency decision under attack?
3. Whether a school board policy that categorically prohibits transgender students from using restrooms consistent with their gender identity, effectively excluding them from using the common restrooms used by other students, violates Title IX and its implementing regulations?

# VIII

# INTO THE COURTROOM

# 32 Oral Argument

## §32.1 Your Three Goals at Oral Argument

Whether you are arguing a motion to the trial court or an appeal to an appellate panel, your goals will be the same. First, you want the judges to remember your argument by getting them *interested* in your case and *motivated* to rule in your favor. They'll hear many other arguments on the same day, and they'll read many other briefs in the week they read yours. They'll forget your theory of the appeal unless your argument stands out.

Second, you want to focus the judges' attention on *the key aspects of your case that are most determinative:* the one or two issues that are fundamental; the facts that are most prominent in your theory; the rule or rules for which a decision in your favor would become precedent; and the policy considerations that most compel the result for which you argue. Judges expect oral argument to help them find the heart of the dispute. That's because oral argument works best when it concentrates on the few large ideas that are most relevant, while details are best left to the briefs.

Third, you want to discover the judges' concerns about your case so you can satisfy doubt and clear up confusion. And you want to learn which issues the judges think are most important: if those are profitable issues for you, you can concentrate on them, and if they're the wrong issues, you can try to persuade the court of that. When the judges interrupt, they usually aren't trying to debate with you; they're telling you what troubles them and asking you to help them make the decision. You should welcome questions as an opportunity to understand what is concerning the judges and address it.

## §32.2 Structure of an Oral Argument

Motion arguments in trial courts take many different forms. They can be casual and take place inside a judge's chambers, or be more formal and take place at counsel table or a podium in a courtroom. Appellate arguments are formal, often with strict time limits for the parties. When the case begins, the moving party (in a trial court) or the appellant (in an appellate court) presents their case first, followed by a response from the opposing party. In some cases, the moving party or appellant can argue again in rebuttal.

Begin with an opening statement that reminds the court of the nature of the case and pushes your theory with a combination of facts and law. In the left column below is a reasonably effective opening:

Good morning, Your Honors. I'm Allison Korngold, representing Andrea Pafko, the appellant here and the defendant below. We are appealing Ms. Pafko's conviction for receiving stolen property on the grounds that the State did not prove that Ms. Pafko knew the property was stolen — an essential element of the crime.

An alternate start — preferred in some courts — would be "May it please the court. I am . . . ."
Notice how the lawyer gets to the heart of the case — and her theory — immediately. You don't have time to beat around the bush.

At trial, the only evidence the State produced was that Ms. Pafko picked up a satchel that had been left in a street, and that she opened it, found $7,150, and took it home.

The lawyer begins by describing the most critical aspects of the client's story. The story should be told concisely and quickly. You do not have a lot of time.
If the judges have read the briefs thoroughly and know the story, they might cut the lawyer off and start asking questions.

After the State rested, Ms. Pafko's trial lawyer moved for a directed verdict of acquittal on the ground that the State had produced no evidence of a key element of the crime: that, at the moment Ms. Pafko obtained the property, she knew that it had been stolen or knew of circumstances that would lead a reasonable person to believe that it must have been stolen.

This part of the opening reiterates the grounds for relief in more detail and incorporates the legal rule at the heart of the error asserted.

Despite the State's lack of evidence, the trial judge denied the motion, and Ms. Pafko was convicted.

This is the error that is the basis for the appeal.

Finding $7,150 in a satchel would not, alone, compel a reasonable person to believe that the money had been stolen. It was in the street leaning against the curb, where someone getting into a car could have dropped it. There was no evidence that Ms. Pafko had any reason to believe that that person wasn't the money's owner.

Now the lawyer begins explaining the law and how it justifies reversal.

The case law . . . .

Your organization should vary based on the nature of the issues. For example, your opening might emphasize the procedural history, or forego the facts and start with the legal issues. It really depends on what is critical to your theory. The most important thing is to get your theory out there early. But remember that the facts are often compelling, and they are an effective way to orient the court to the legal issues, especially when woven together with your theory.

If you represent the opposing party, your opening should be designed to show the court vividly how your theory differs from the appellant's:

> If the court please, I'm Allan Kuusinen, for the State.
>
> The evidence shows that the defendant found an amount of money so large that the person who lost it would have returned as fast as possible to retrieve it from the place where it was lost — unless that person was afraid to return. The true owner would have nothing to fear. But a person who stole the money might. Without speculating, a jury could have reasoned this way, which justified the trial court's denial of the defendant's motion for a directed verdict.

When you are opposing the motion or appeal, you must balance making affirmative arguments against responding to the arguments and questions you just heard. You should know your opponent's argument from the brief and plan what you want to say, but also be ready to respond to issues that arise during the argument. If the judges seem preoccupied with an issue you didn't intend to focus on, you might want to shift and give that issue more emphasis.

Unless the bench is "cold,"[1] the judges' questions and your answers will likely quickly fill up your allotted time. Your time is finished when the chief or presiding judge, in a firm tone, says, "Thank you." When your time has expired, conclude with a brief sentence in which you specify the relief you seek ("Therefore, the judgment below should be affirmed because . . ."). If you're in the midst of answering a question when your time runs out, ask for permission to finish the answer, and, if permitted, finish quickly and concisely.

If, on the other hand, the judges continue to ask you questions after your time expires, answer them fully. The court has impliedly enlarged your time.

1. A "hot" bench is one that erupts with questions. A "cold" bench is one that listens impassively.

If you complete your argument before your time is up, pause to see whether you'll be asked further questions, and, if not, conclude and sit down. Whatever the situation, you can signal your intent to finish by using an introductory phrase, such as "In conclusion, . . ."

If you are given the opportunity for rebuttal,[2] you can use that time, after your opponent's argument, to reply to points your opponent made in his or her argument that you think particularly damaged your position, or to correct inaccurate or misleading statements. A court considers its time wasted if you use rebuttal to reiterate arguments already made, or to raise new arguments for the first time. You can usually make only one or two quick points on rebuttal. You can appear petty if you try to rebut every minor point your opponent made, and you probably don't have time anyway. If it turns out that there's no need for rebuttal, you can make a confident impression by waiving it. A rebuttal ends with a sentence reminding the court of the relief sought.

## §32.3 Questions from the Bench

You should welcome questions as an opportunity to engage with the judges and advance your arguments. You should try to figure out why the judge is asking the question, and how to best answer it, while moving your argument forward. Some questions are neutral requests for information about the record, the law, or the procedural posture. Some questions test your position, asking you how you would overcome an adverse policy or equity argument, or a contrary interpretation of authority or the record. Sometimes a judge wants you to address a concern, and sometimes a judge asks you to elaborate on a point the judge believes to be particularly persuasive. Some questions are neutral, aimed at getting you to move to a new point in your argument. Some questions raise concerns the judge has after reading your brief, while others grow out of the spontaneity of the moment.

When you hear a question, listen to it carefully, and don't be afraid to pause for a moment to think before answering. Never interrupt a question. Try to figure out the question's purpose and exactly what's troubling the judge. Then craft your answer to satisfy the skepticism or curiosity implied by the question. Start your answer by stating your position on the question ("No, your honor, the Smith case doesn't undermine my point."), and then give your reasoning succinctly. Try not to ramble; just make your best points and wrap up. As you've seen in so many ways, the law-trained mind most easily understands discourse that lays out a conclusion before proving it. If you get wrapped up in a lot of preliminary material before you state a conclusion, the conclusion can be obscured or even lost.

2. The time reserved is subtracted from the time allowed for the appellant's main argument. You can reserve time by telling the court after you introduce yourself in the opening to your main argument.

Don't leap to big assumptions about a judge's predispositions from the questions the judge asks. A neutral judge might ask challenging questions just to see whether your theory will hold up. A friendly judge might ask challenging questions to cause you to argue matters that the judge believes might persuade others on the bench. And an adverse judge might ask friendly or neutral questions out of politeness and a sense of fairness.

Always answer the question directly and immediately. Never defer a judge's question ("I'll get to that later."). It is disrespectful, and you may never get there because of other questions. The answer will also be most persuasive immediately after the question is asked. If a judge asks you to discuss an entire issue earlier than you had planned, do it, and rearrange the order of your presentation to accommodate the judge's needs. Later, when you reach the spot where you had intended to discuss the issue, skip what you've already covered.

Answer the question you are asked, not one you wish had been asked. A judge will be frustrated if you try to dodge the question. Every case has weaknesses, and you should be prepared to address them. If your side of the case didn't have them, your adversary would have given up long ago. Where a judge has truly identified a point of weakness, face it and give a realistic counter-argument. Here are three examples:

> I agree, Your Honor, that in that hypothetical the police would have had probable cause, but the facts of the hypothetical differ in significant ways from this case. . . .
>
> Yes, *Soares* did hold that, but later rulings of this court have impliedly undermined *Soares* . . . .
>
> Certainly, the record does reflect two isolated events that might be construed as evidence of good faith by the defendant, but the record also includes many, many events, stretching over several years, that show exactly the opposite. . . .

Hedging and lack of candor harm your credibility. If you can project an aura of honesty and forthrightness, your arguments will be all the more persuasive.

During the answer, build a bridge to the rest of your argument. If the question causes you to make part of your planned argument out of order, you can return to your argument at a point that's logically related to the answer. If the answer covers material that you hadn't planned to speak about, use the answer to lead back to your planned argument. If you do this smoothly, it may be hard for a listener to tell when the answer has ended and you've returned to your planned presentation. Practice moving from one point to another in a variety of orders. Make a list of transition phrases and points (e.g., "Your Honor, that leads me to my second point, which is . . ." or "The fact you bring up, your Honor, is also central to my second point, which is . . .") Your theory of the case can serve as a bridge to help you link your arguments together.

You'll be better able to manage questions if you develop what one judge calls "controlled flexibility": "a relaxed resilience allowing one to respond to a judge's question, coupled with an internal gyro compass enabling one to return gracefully to a charted course."[3] How do you develop this? Practice, practice, practice. Make up a list of flash cards with the most likely hard questions on them. Ask a friend to shuffle them and ask the questions in random order. The more you speak about the case, the easier it will be to do so flexibly.

If you are asked a question to which you don't know the answer, the best thing to say is exactly that. Judges are skilled interrogators, and you'll quickly be found out if you try to fake your way through an answer. If you once knew the answer, you might feel a little better saying something like "I'm sorry, Your Honor, but I don't recall." Judges know that you're human, and, unless the point you don't know is a big one, you gain credibility by admitting that you cannot answer.

If you think you understand the question but aren't certain, say that in your answer so the judge can help you out in case you have missed the gist of the question:

> If your Honor is asking about the possibility that the issue hasn't been preserved for review — and please correct me if I've misunderstood — trial counsel made a timely objection and moved for . . .

If you plainly don't understand the question, ask for clarification:

> I'm sorry, Your Honor; are you asking about whether the order appealed from is final?

This is one of the very few kinds of questions that *you* might ask during an oral argument.

## §32.4 Delivery, Affect, and Style

There is no one right style for oral argument. You will need to find what works for you based on your personality, the nature of the case, and the formality of the court before which you are appearing. You should always treat the court with respect, but remember that, although judges may be expert in procedure, they may not know the substantive law as well as you do, and they certainly don't know your client's situation and your theory of the case as well as you do. Your job is to educate and persuade respectfully.

The best oral arguments are conversations in which you take the initiative — talking *with* the judges, not at them. It is a somewhat unusual conversation,

3. Frank Morey Coffin, *The Ways of a Judge* 131 (1980).

constrained by the formal argument structure and focus on the decision the judges must make, but it's a conversation nonetheless. If you do the following, you can create for yourself a persuasive presence that helps you reach and engage the bench:

*Look straight at the judges* — preferably making eye contact — throughout the argument. Use notes only to remind yourself of the next subject for discussion, and even then, get your eyes off your notes and back to the bench as quickly as possible. Whenever you look away from the judges, their attention can wander, partly tuning you out. And judges become annoyed with lawyers who read their arguments to the court.[4]

*Don't distract the court with restless or anxious movement.* Don't play with a pen, shuffle your papers around frequently, put your hands in your pockets, or sway forward and back. Limit your gestures to those that naturally punctuate your argument. A visually busy lawyer radiates nervousness, rather than the confidence needed to establish psychological leadership. It is natural to feel nervous, but try not to let nerves get in your way. Many lawyers find that the nerves fade once a judge asks a question and the conversation begins. The more arguments you do, the less nervous you will feel. Even the most experienced advocates can feel nervous before a big argument, but they learn how to keep those nerves from showing.

*Speak loudly enough that the judges don't have to strain to hear you.* If you're soft-spoken by nature, breathe in deeply before you begin and make an effort to project your voice. If you already have a powerful voice, don't get carried away. Nobody likes to listen to shouting.

*Use the tone and volume of your voice to emphasize the more important things you say.* A listener finds it hard to stay focused on someone speaking in a monotone. Vary your pace and volume to emphasize or deemphasize your points. Pause before or after your most important remarks. Try not to speak too quickly, especially if you are nervous. Don't be afraid to pause and compose your thoughts. The judges won't mind a second or two of "dead air" while you do so.

*Communicate tenacity, and what one judge has called "disciplined earnestness":* "A communicated sense of conviction that pushes a case to the limits of its strength but not beyond. One somehow brings together one's words and body language, facial expression and eye contact, to radiate a sense of conviction without making every point a life-and-death issue."[5]

*Unless asked, avoid extensive detail in discussing authority.* Because oral argument works best when focused on the big ideas in the appeal, you're better off concentrating instead on rules of law, policy arguments, and broad descriptions of authority. Citations and the minutiae of authority are very hard to

4. *See* U.S. Sup. Ct. R. 28.1 ("Oral argument read from a prepared text is not favored") and Fed. R. App. P. 34(c) ("Counsel must not read at length from briefs, records, or authorities").

5. Coffin, *supra*, n. 3 at 132.

follow when delivered orally. That's what your brief is for. If your case is built on a synthesis of authority, describe it generally ("the majority of jurisdictions," "the recent trend of cases in other states," "seven of the federal circuits," "this court has previously held"). If one key case deserves attention, refer to it by name and provide the important details. The name and sometimes the year of a case are enough — you don't need to provide the full citation. And if you must quote — as you might with a crucial statute or holding — limit yourself to the essential words that the court must interpret.

*Know your record thoroughly, use it to its full advantage, and don't discuss "facts" outside the record.* Concentrate on the few facts that are most determinative, and mention, along the way, one or two facts that most bring the story to life. Some facts don't logically have legal significance, but they help the judges "see" the story and put the case into a realistic perspective.

## §32.5 Formalities and Customs of the Courtroom

Dress in court-appropriate attire. Generally, that means a suit or business clothes, though it may vary depending on court and jurisdiction.

An oral argument is not a jury trial. Stay in one place rather than moving around.

Don't directly address your opposing counsel. In court, lawyers speak only to the bench, and — when the bench gives permission — to witnesses and juries. Because there are no witnesses or juries in oral arguments, you'll speak only to the judges.

Although the level of formality varies in different courts, avoid speaking in slang, in emotional rhetoric, or in terms that unnecessarily personalize the lawyers or judges. Even when discussing your adversary's arguments, refer to them as the party's, rather than as the lawyer's. There is a world of tonal difference between "The plaintiff mistakenly relies . . ." and "Mr. Maggione has mistakenly told you . . ." Similarly, don't speak to the bench in flattering language. Judges are satisfied with respect; they're offended by obsequiousness.

While your adversary argues, listen attentively and without facial expressions that could convey your opinion of what is transpiring. Make whatever notes you'll need to help you respond in your own argument (if you're the appellee) or in rebuttal (if you're the appellant). Don't interrupt your adversary's argument.

## §32.6 Preparation for Oral Argument

The best way to prepare for oral argument is to identify the key points you want the judge to take away from your argument; anticipate questions and practice your answers; and make sure you are intimately familiar with the

facts, the law, and your opponent's argument. Prioritize your key points and think about how you will address them at different levels of depth. That way, whether you get a hot bench that peppers you with questions, or a cold bench that asks almost none, you will be able to use your time effectively.

There are many ways to prepare notes to use during your argument. After you've argued several times, you'll figure out which type and style of notes work best for you. Remember that this is not a speech, and writing out sentences that you plan to read verbatim will not be an effective strategy. You need to be prepared to be flexible, because judges might ask questions in a different order than you had planned to argue. Prepare notes that allow you to look quickly, find your point, and look back up at the judges. If you're well prepared, you'll know your case so well that a few bullet points or a broad outline of your points will be enough.

In addition to your main points, you may want the names and citations of key authority; some key facts and their citation to the record; and key phrases you intend to use. You may want to write some notes to yourself, such as "slow down" and "breathe." Have the record and briefs close at hand in case you are asked about their contents. Especially with the record, use tabs to mark for quick reference passages that the judges might want explained.

Plan your argument by weaving together policy, the facts, and the controlling rules of law into the seamless theory enunciated in your brief. Show how policy and the facts compel your conclusion, while the law can be used to justify it. If the standard of review and the procedural posture place procedural burdens on you — requiring you to plead certain facts or produce evidence of them — be sure to show the court how you have carried those burdens. If the burdens rest on your adversary, show instead how your adversary failed to carry them.

Remember that you can't cover all the arguments you made in the brief. Focus on the most important material.

Make a list of every weakness in your case and every question that you would be tempted to ask if you were a judge — and prepare an answer to each of these. What rule will a decision in your favor stand for? It would become precedent. The judges will care deeply about policy concerns; how will the law in the future treat facts that are similar to — but not exactly the same as — yours? What would be the practical effects in the courts, in the economy, and in society as a whole? Why is the rule you advocate better than the one your adversary urges? Imagine hard questions that you might be asked. Then study your adversary's brief and the precedents that are contrary to your position.

Try also to predict which concessions you'll be asked to make. Figure out which concessions you cannot afford to make, and which you'll have to make in order to protect the reasonableness of the rest of your case. If you think about this for the first time when you're actually asked to make the concession, a very large part of your case could easily disappear in a snap misjudgment.

Finally, check your research the day before you argue. In the time between submission of the brief and oral argument, the law might have changed. Check to see whether controlling statutes have been amended or repealed; whether any of the key cases have been overruled; and whether any of the recent precedents has been reversed or affirmed. You need not check every citation in your brief, but you don't want to discover in the courtroom that some important texture of the law has changed.

## §32.7 *State v. Dobbs and Zachrisson:* An Oral Argument Dissected

To help you understand how oral argument influences judicial decision-making, this chapter concludes with a dissection of the arguments in a real appeal,[6] comparing them to the decision subsequently made by the court to whom the arguments were addressed.

In the city where this case arose, Dobbs operated an illegal gambling business in one neighborhood, and Zachrisson ran a similar enterprise in another area. Dobbs and Zachrisson were each indicted on 16 counts of bribery and one count of conspiracy to bribe. (They weren't indicted for illegal gambling, perhaps because the police lacked the evidence required by the gambling statute.) At trial, a police officer named Porfier testified that Zachrisson had given her money for not enforcing the law against him and Dobbs, and for arresting their competitors instead. The prosecution also introduced tape recordings of conversations between Porfier and the defendants. Dobbs and Zachrisson testified in their own defense. A jury convicted on all 34 counts.

At trial, Zachrisson and Dobbs each asserted the defenses of entrapment and coercion, which are separately defined in the state's Criminal Code:

> **§ 32. Defense of Entrapment**
>
> In a prosecution for any crime, it is an affirmative defense that the defendant engaged in the prohibited conduct because he was induced or encouraged to do so by a public servant, or by a person acting under a public servant's direction, where the public servant or the person acting under his direction acted for the purpose of obtaining evidence against the defendant for the purpose of a criminal prosecution, and where the methods used to obtain that evidence created a substantial risk that the crime would be committed by a person not otherwise disposed to commit it. Conduct that merely provides a defendant with an opportunity to commit a crime is not entrapment.

6. The names of the parties, judges, and lawyers and the citations to local authority have all been changed. The wording of the local statutes has been altered slightly for clarity. To make the story easier to follow, many of the facts have been simplified, but not in ways that are relevant to the court's analysis. Some of the people described here are composites from a larger cast of characters in the original appeal.

**§ 963. Bribery; Defense of Coercion**

(a) In a prosecution for bribery, it is a defense that the defendant conferred a prohibited benefit on a public servant as a result of that public servant's coercion of the defendant.

(b) For the purposes of this section, a public servant coerces a defendant by instilling in the defendant a fear that if the defendant does not comply with the public servant's wishes, the public servant will cause physical injury to the defendant or another, cause damage to property of the defendant or another, cause criminal charges to be brought against the defendant or another, or otherwise abuse the public servant's power as an official of the government.

Porfier testified that initially she approached Zachrisson in an attempt to recruit him and perhaps others as informants. She suggested that Zachrisson set up a meeting with any other bookies that Zachrisson thought might be interested. Zachrisson suggested Dobbs. A meeting of the three of them was arranged, but Dobbs didn't show up. At this and other meetings, Porfier wore a "body wire" (a hidden microphone that transmits to a nearby receiver). Zachrisson told Porfier that he needed police protection from aggressive gamblers with mob connections who were moving into his territory. The jury heard a recording of Zachrisson telling Porfier that if she made it easier for him to make a profit, he could "send some money your way." Porfier told him that she would have to think it over, and that he should find out whether Dobbs wanted to make the same arrangement.

A week or so later, Zachrisson and Porfier met again. Porfier told Zachrisson that she would accept money from Zachrisson and Dobbs, that she wouldn't arrest them or their employees, and that she would arrest their competitors. Zachrisson told her that Dobbs was "interested." Zachrisson began making periodic payments to Porfier of $100 to $200 (all of which Porfier turned over to the police department). Zachrisson and Dobbs continued their operations without police interference, and some of their competitors were arrested.

A few months after this arrangement began, Zachrisson told Porfier that he and Dobbs — whom Porfier had still not yet met — wanted to expand their gambling enterprises and were willing to bring in Porfier as a silent partner. Zachrisson told Porfier that she would receive a percentage of the profits in exchange for police protection for Zachrisson and Dobbs. Porfier and Zachrisson met one more time, and that was the only meeting attended by Dobbs. Dobbs stated that he agreed with Zachrisson's goals, but Porfier did not start receiving a share of the profits until a few weeks later.

Zachrisson testified that he paid Porfier because he was afraid that he would be arrested if he did not, and he presented evidence that during the time these payments were being made he had complained to others that Porfier was "shaking me down." Dobbs testified that Porfier had threatened to put him out of business if he did not agree to pay her off.

Both defendants moved for directed verdicts of acquittal on the grounds of coercion and entrapment. The trial court denied the motions. On appeal to the state's supreme court, both defendants argued in their briefs that their convictions should be reversed because the motions should have been granted.

Dobbs asserted two additional grounds for reversal. First, he argued that the trial court committed reversible error in instructing the jury that if they convicted him of conspiracy, they could also convict him of bribery because of the acts of a co-conspirator (Zachrisson).

Second, Dobbs argued that his rights to a speedy trial had been violated. Delay in coming to trial might arise from prosecutorial tardiness, from tardiness on the defense side of the case, from court congestion, or from some combination of these sources. When a defendant moves to dismiss an indictment for lack of a speedy trial, the trial court tries to determine the sources of delay. Delay due to defense tardiness is ignored as "excludable time." Otherwise, defendants would profit from procrastination by their own lawyers. Delay caused by prosecutorial tardiness is "chargeable time" because prosecutors are expected to take the initiative in moving cases to trial. You'll see in a few moments whether this state treats court congestion delay as excludable or chargeable time.

Reproduced below is a condensation of the transcript of the oral arguments in the state supreme court. Immediately after the transcript is a synopsis of the court's opinion. When you compare the oral arguments to the court's decision, try to understand the cause-and-effect relationship: how do the arguments seem to have influenced what the court did?

THE CHIEF JUDGE: Mr. Womack?

WOMACK [for Zachrisson]: May it please the court. I'll argue the issues of coercion and entrapment. My brief sets out the statutory definition of coercion in a bribery case. The evidence at trial was that Zachrisson, after he had made one or two payments, went to a friend of his and complained about the police. The friend then went to a judge in a neighboring county and reported that Zachrisson was being "shaken down" by the police — that over a period of months, the police had been intimidating Zachrisson and asking him for money in exchange for favors. You can't read the summary of the meetings here and not be convinced that the police

What do you think of this opening? Does it suggest immediately that what happened in the trial court should make us uncomfortable? How would you have improved it?

were the principal participants — instigators and initiators of all the activity that led up to the money changing hands. It's a question of law as to whether this was voluntary.

JUDGE BECENTI: The police denied it, didn't they?

WOMACK: Yes.

JUDGE BECENTI: Doesn't that make it a question of fact, to be resolved by a jury?

WOMACK: No. Entrapment can be decided on the undisputed, undeniable facts here.

JUDGE BECENTI: As a matter of law?

WOMACK: As a matter of law. Porfier has known the defendants for approximately six years, knew that they were small-time gamblers, and knew that they were involved with after-hours bars, having dealings with them for over a year and a half. Those are misdemeanors, but bribery is a felony. The testimony was that everybody knew the defendants were gamblers. Yet the police spent all that time seeing them on a regular basis and never arrested them for any gambling offenses.

JUDGE BECENTI: They investigated organized crime and gambling, didn't they — an ongoing thing?

WOMACK: If they were investigating organized crime, what came of it? Why did it take them almost two years to get the defendants for bribery?

Generally, rhetorical questions do not persuade. It is more effective to lay out each step of the argument.

JUDGE STEIN: Doesn't that argument cut both ways, because if it took that long, the coercion wasn't very effective?

WOMACK: I disagree. Porfier exacted promises of a hundred dollars a week from these defendants. Porfier manufactured a crime. She got very little money from Zachrisson and then pressured him to introduce her to Dobbs. And that in itself was improper conduct.

JUDGE BECENTI: You'd have to argue that that's entrapment as a matter of law, wouldn't you? The facts were decided against you in the trial court, and we're bound by that.

WOMACK: Yes, I would argue that it was entrapment as a matter of law and that coercion was proved. Porfier engaged in improper conduct because she decided that she wanted to get the defendants for a higher crime than gambling. And in this way, Zachrisson's reluctance to commit the crime was overcome by persistence. I believe, in this case, that this is obvious. Zachrisson resisted making payments, and the payments did not begin until long after the demands had started. Porfier just kept going because she wasn't satisfied with arresting the defendants on petty gambling charges.

Do you find this theory persuasive? If you don't, is that because the theory is faulty, or because it isn't being adequately supported by the facts and law at the lawyer's disposal?

JUDGE STEIN: Is there anything wrong about that, as long as it doesn't amount to entrapment? If something is going on, is there any reason why police can't wait before arresting until they accumulate more evidence?

WOMACK: No, Your Honor, if it's indeed going on, but in this case, it wasn't going on when Porfier first got involved. I see my time is up. Thank you.

Has the lawyer persuaded you? Why or why not?

THE CHIEF JUDGE: Ms. Underwood?

UNDERWOOD [for Dobbs]: Your Honors, Johnny Dobbs met with this police officer only once, and that was after the officer demanded that Dobbs be there. He came only after she made five separate demands that he meet with her. Dobbs met with the officer on one occasion and never saw her again. There was no evidence in this trial that he had anything else to do with Officer Porfier. And at that one meeting, he said only one thing of any substance. When the officer suggested that she should arrest some competing gamblers to shake them down.

Notice how this lawyer starts off with her best facts to undermine the bench's confidence that whatever happened in the trial court was probably not unjust. (Remember that appellants have the burden of demonstrating error, and that appellate courts are affirmance-prone.) This presentation paints a vivid picture with a few, very carefully selected facts. As you read the synopsis of the state supreme court's decision, try to figure out what effect that picture had on the bench. (The synopsis is printed at the end of this transcript.)

Dobbs said, "Do we really have to arrest people? I don't want that to happen." He disagreed with the plan proposed. And when somebody said, "Johnny, you're not saying much," he replied, "You don't learn anything by talking." These are not words of joining a conspiracy. These are not words of attempting to bribe anyone. And if this is the only evidence in the case, he cannot be considered to have joined a conspiracy. He certainly didn't do it through his own words. The law is clear and settled that the words of somebody else cannot bind a defendant to a conspiracy. There was no evidence that he ever committed any other act in this whole scheme. On this kind of record, the jury should not have been instructed that they could convict Dobbs of bribery.

In fact, Porfier tried five times to get Dobbs to meet with her. And when he finally did meet with her — and this leads into the issues of coercion and entrapment — the first thing she said was, "I can put you out of business; I can go into your neighborhood tomorrow and arrest your people and close you down." These words are coercive as a matter of law. And it is also entrapment as a matter of law, because the police officer forced the meeting where she made these coercive statements. Here, the police officer created the crime of bribery . . .

This transition is smooth, but also clearly announced, so that the bench can follow the lawyer's organization.

JUDGE ORTIZ [interrupting]: You haven't mentioned your speedy trial issue, which you argue in your brief. You still press it?

UNDERWOOD: Yes, absolutely — every point in the brief. In the trial court we tried to demonstrate — and the court wouldn't permit us — that other cases that had been indicted after Dobbs were tried before him, even though those other defendants were not in jail.

Notice how the lawyer picks up the questions and uses them as a springboard for argument.

JUDGE ORTIZ: You consistently answered ready?
UNDERWOOD: Every time.
JUDGE ORTIZ: There was an 18-month delay?
UNDERWOOD: Yes, Your Honor.
JUDGE ORTIZ: The only excuse given in the trial court was calendar congestion?
UNDERWOOD: Yes.
JUDGE ORTIZ: And you sought no continuances or adjournments during this period?
UNDERWOOD: Not one.
JUDGE ORTIZ: When you made your motion for speedy trial relief, you claimed both a constitutional violation and a violation of our speedy trial statute?
UNDERWOOD: Yes, both issues raised below . . .
JUDGE BECENTI [interrupting]: Were there extensive plea bargaining negotiations?
UNDERWOOD: Not one minute of it, Your Honor.
JUDGE STEIN: Has there been any showing of prejudice?
UNDERWOOD: Yes, in the human sense, but not in the sense that we couldn't find any evidence.
JUDGE BECENTI: Any lost witnesses, anything like that?
UNDERWOOD: No.
JUDGE STEIN: Were the defendants in jail during this time or were they out on bail?
UNDERWOOD: No, Dobbs was not in jail.
JUDGE STEIN: Have you read our opinion in *Weatherby*?

Are Judge Ortiz's questions hostile? Or does he seem to be helping the lawyer make clear that the delay was not caused by the defense, and that the question has been properly preserved for appellate review?

This exchange seems to have sparked the interest of Judges Becenti and Stein. What do you think Judge Ortiz was trying to accomplish?

UNDERWOOD: Yes, Your Honor, I know . . .

JUDGE STEIN [interrupting]: That must not have disappointed you.

UNDERWOOD: Well, . . .

JUDGE ORTIZ [interrupting]: You say this was 18 months?

UNDERWOOD: Yes.

JUDGE ORTIZ: *Weatherby* was 18-and-a-half months.

UNDERWOOD: Yes, I know, Your Honor.

JUDGE ORTIZ: And Weatherby is now at home.

*Weatherby* seems at least superficially to favor Dobbs. If Judges Stein and Ortiz had to make a decision on this issue right now, how do you think they would rule? Why do you think so? As you later read the argument for the State and the synopsis of the court's decision, remember the prediction you made here.

UNDERWOOD: If the court please, I chose to concentrate today on the other grounds for reversal because I know Your Honors were aware of that, and I feel that that was an argument I didn't need to press any further. I think I've taken all my time. Thank you very much.

THE CHIEF JUDGE: Mr. Lysander?

LYSANDER [for the State]: May it please the court . . .

JUDGE STEIN [interrupting]: What about *Weatherby,* Mr. Lysander, isn't that dispositive of the speedy trial issue?

Judge Stein has gotten *very* interested in the speedy trial aspect of the case.

LYSANDER: Your Honor, in this case, the speedy trial motion was made orally and not in writing. It was made on the eve of trial and without any prior notice to the prosecution. *Weatherby* is distinguishable because there the issue was raised in the trial court in a way that permitted the prosecution to find out the reason for every delay and to put that reason in the trial court record. That didn't happen here.

Do you think this lawyer was prepared to answer questions on the speedy trial issue?

JUDGE STEIN: In this appeal, did the prosecution oppose the motion in the trial court on the ground that it needed an opportunity to prove that each delay was justified?

LYSANDER: I'm not sure, Your Honor.

JUDGE STEIN: Perhaps the motion should have been made in writing and with prior notice to the prosecution, but if it were not, and if the prosecution didn't object to that, I would think that your procedural objection would have been waived.

LYSANDER: Your Honor, this was a pre-*Bachman* case. Before your holding in *State v. Bachman,* both the prosecution and defense were presenting their arguments in trial courts under somewhat lax procedural standards. However, . . .

JUDGE STEIN [interrupting]: But the defendant shouldn't be prejudiced, then, by that fact, if there were relaxed standards.

LYSANDER: That's correct, Your Honor, but I'm simply saying that the prosecution would be prejudiced in that we were never given the opportunity to have a hearing to develop a complete factual record for the reasons for each delay.

JUDGE STEIN: But wasn't the only excuse advanced trial court congestion?

LYSANDER: The prosecution answered ready for trial for the first time only three months after the indictment, and there was difficulty getting a free courtroom on that date.

JUDGE STEIN: And we held in *Weatherby* that courtroom congestion is no excuse.

LYSANDER: But you also held in *Greenfield* that the trial court's inability to schedule a trial was an excuse. And there has never been an allegation of prejudice to Dobbs because of the delay, and Dobbs was the only defendant to raise this issue in the trial court.

Read coldly in a transcript, this answer might seem flippant. But if it is spoken in the proper tone of voice, it becomes exactly the "respectful intellectual equality"[7] that persuades. We can never know how much the court was influenced by this answer (or by the prosecution's brief), but compare the answer to the court's decision on this issue.

7. Frederick Bernays Wiener, *Oral Advocacy*, 62 Harv. L. Rev. 56, 72-74 (1948).

JUDGE ORTIZ: But the question is now before us, and it was raised below — although you say it was raised orally instead of on papers —

LYSANDER: That's correct.

JUDGE ORTIZ: The only excuse the prosecution offered is calendar congestion, is that correct?

LYSANDER: That is the only excuse I am aware of, but we never had an opportunity for a hearing, so I don't know what would have developed had there been a hearing.

JUDGE ORTIZ: At the time the motion was made, there was no excuse given, other than that?

LYSANDER: No, but as a practical matter, when a motion like that is made on the eve of trial all of a sudden — just before a three-and-a-half-week trial that everybody has been preparing for — on the eve of trial, when the defendant suddenly claims his speedy trial rights have been violated, the prosecutor would have to do an investigation in order to be able to account for each and every continuance that happened in the past.

Has this lawyer had any effect at all on Judges Ortiz and Stein? When you read the synopsis of the court's decision, notice how they vote.

JUDGE STEIN: Was there any request by the prosecutor for additional time to answer the motion — so the prosecutor could develop the record that you're now suggesting could have been developed?

LYSANDER: I don't believe that there was, Your Honor, but if there had been, that would have defeated the ends of getting the trial completed as soon as possible. [pauses] Concerning the question of whether the defendants were entrapped by the police. . . .

(The remainder of the State's argument is omitted here.)

## STATE v. DOBBS AND ZACHRISSON

BECENTI, J.

Dobbs's bribery convictions are reversed. His conspiracy conviction is affirmed. All of Zachrisson's convictions are affirmed.

Dobbs's bribery convictions are reversed because the trial court erroneously instructed the jury that they could convict him of bribery for the payments made by Zachrisson. There was no evidence that Dobbs actually made any bribe payments. Guilt of a substantive offense like bribery may not be predicated solely on a defendant's participation in an underlying conspiracy.

A conspirator is not necessarily an accessory to a crime committed in furtherance of the conspiracy. Under section 129 of the Criminal Code, a person is criminally responsible, as an accessory, for the act of another if the person "solicits, requests, commands, importunes, or intentionally aids" the other person to engage in that offense. Conspicuously absent from the statute is any reference to one who conspires to commit an offense. That omission cannot be supplied by construction. It may be true that in some instances a conspirator's conduct will suffice to establish liability as an accessory, but the concepts are different. To permit mere guilt of conspiracy to establish the defendant's guilt of the substantive crime without any evidence of further action on the part of the defendant would be to expand the basis of accessory liability beyond the legislative design.

But we reject Dobbs's further claim that his statutory and constitutional rights to a speedy trial were violated by the delay between his indictment and his trial. Dobbs does not claim to have been prejudiced by the delay in coming to trial. He was not incarcerated, and he does not assert that any of his witnesses disappeared or suffered a fading of memory. *State v. Weatherby* is therefore distinguishable from this appeal. Moreover, when Dobbs moved in the trial court to dismiss for lack of a speedy trial, court congestion was assigned as the reason for the delay, and the prosecution was ready for trial within three months of the indictment. Thus, Dobbs is not entitled to dismissal pursuant to our speedy trial statute, which requires that the prosecution be ready on time, but places no corresponding obligation on the trial court. See *State v. Greenfield*.

Finally, both defendants urge that the prosecution failed to disprove the bribery defense of coercion beyond a reasonable doubt, and that the evidence establishes the affirmative defense of entrapment as a matter of law. The record does not support these contentions. The defendants' motions were correctly denied, and the issues were properly submitted to the jury.

The record before us presents a conflict between the prosecution's version of events and that of the defendants. The defendants asserted that the police officers induced their participation in the bribery scheme and employed coercive tactics to ensure compliance. Although the record does reveal some evidence of conduct that might be construed as harassment, there is also evidence of mutual cooperation. Hence, resolution of the issues was a purely factual matter within the province of the jury.

[There were no dissents.]

# APPENDICES

# Appendix Statute Analysis Exercises

This appendix includes two exercises.

## Exercise A
## Plagiarism and the Board of Bar Examiners

Hardy and Tisdale were enrolled in a law school course in which students write and submit papers. They were given identical assignments. Tisdale wrote a draft of the first half of his paper before Hardy did, and Hardy asked to see it. That was forbidden by the course rules. Tisdale showed Hardy what he had written anyway and sent him a copy of the wordprocessing file as an email attachment.

Hardy downloaded the attachment and changed as many of the words as he could. When he was finished, the first half of the two papers had approximately the same organization, although about 80 percent of the words were different — similar, but different.

Tisdale and Hardy then got into an argument insulting each other's taste in music, one of them saying unkind things about Coldplay and the other saying unkind things about Foo Fighters. They stopped speaking to each other. Tisdale wrote the rest of his paper and didn't show it to Hardy. Hardy researched to find what he would need for the second half of his paper. On the due date, they submitted their papers.

But a paper derived from another can never really be purged of all noticeable traces of the original. The teacher instantly recognized the similarity between the first half of Hardy's paper and the first half of Tisdale's.

In the second half of Hardy's paper, the teacher also noticed phrases that didn't "sound like" him. The teacher had a vague memory of having seen those phrases previously somewhere else. To design assignments and to keep up in their field, teachers read cases, articles, and books constantly. The teacher logged onto LEXIS and then onto WESTLAW, typed the suspect phrases from Hardy's paper, and searched for all the sources in which they appeared. In this way, a teacher can easily check a student's paper for plagiarism. The teacher found a number of instances where Hardy had copied passages word-for-word from sources he did not cite and without quote marks around the copied words.

When confronted with all this, Hardy claimed that by changing most of the words in Tisdale's draft he had not misrepresented someone else's work as his own, and that the plagiarism in the second half of his paper was not deliberate. He said that while researching he must have copied into his notes the phrases in question and then forgot that they came from the sources he had read. When writing the paper, he assumed that the words in his notes were his own. The teacher rejected that explanation and gave Hardy a failing grade for the course. The law school suspended him for a year.

Tisdale was also punished, but it's Hardy who poses the issue in this Exercise.

Hardy tried to transfer to another law school. But law schools do not consider transfer applications from students who are in trouble for academic dishonesty. After a year, Hardy returned to the law school that had suspended him. Last spring, he graduated. He has applied for admission to the Wisconsin bar.

In every state, an applicant for admission to the bar must prove to the bar examiners that she or he has the type of character needed to practice law. The applicant must fill out a detailed character questionnaire and submit supporting documents, including an affidavit from the applicant's law school. A false, misleading, or incomplete answer on the questionnaire is itself grounds for denying the application for admission. Every state's questionnaire asks, among other things, whether the applicant has ever been accused of academic dishonesty, and the law school's affidavit must answer the same question.

On his questionnaire, Hardy described what he had done and what the school had done. And in its affidavit, the law school reported — as it must — the same thing.

After admission to the bar, a lawyer can be professionally disciplined if the lawyer commits misconduct in violation of the state's code governing lawyers' ethics. In most states, one agency reviews the character of bar applicants, and a different agency investigates complaints of unethical conduct by lawyers. Admission to the bar and discipline of already-admitted attorneys are two separate processes, although the two have the same goal of protecting the public from unethical lawyers.

As a practical matter, a failing grade in a course can seriously damage a student's chances of finding a good job. Character trouble with the bar examiners or suspension from law school would make a student extremely unattractive to employers. After admission to the bar, the same is true of professional discipline, even if the discipline falls short of disbarment or suspension.

Provisions governing admission to the bar are usually found in a state's court rules as well as in the bar examiners' own rules. A state's ethics code, too, is often found in the state's court rules. All these rules resemble statutes and are interpreted the same way statutes are.

Your research has found the following: two Wisconsin Supreme Court Rules governing admission to the bar; three Wisconsin Board of Bar Examiners Rules; a Wisconsin case interpreting one of the Bar Examiners' Rules; and three cases from other states, each interpreting another state's statute or court rule.

Will Hardy be admitted to the Wisconsin bar?

## Wisconsin Supreme Court Rules

### SCR 22.46. Character and fitness investigations of bar admission applicants

(1) . . .

(2) [T]he applicant shall make a full and fair disclosure of all facts and circumstances pertaining to questions involving the applicant's character and fitness. Failure to provide information or misrepresentation in a disclosure constitutes grounds for denial of admission.

### SCR 40.06. Requirement as to character and fitness to practice law

(1) An applicant for bar admission shall establish good moral character and fitness to practice law. The purpose of this requirement is to limit admission to those applicants found to have the qualities of character and fitness needed to assure to a reasonable degree of certainty the integrity and the competence of services performed for clients and the maintenance of high standards in the administration of justice.

. . .

(3) An applicant shall establish to the satisfaction of the board that the applicant satisfies the requirement set forth in sub. (1). The board shall certify to the supreme court the character and fitness of qualifying applicants. The board shall decline to certify the character and fitness of an applicant who knowingly makes a materially false statement of material fact or who fails to disclose a fact necessary to correct a misapprehension known by the applicant to have arisen in connection with his or her application.

. . .

(5) The dean of a law school in this state shall have a continuing duty to report to the board any information reflecting adversely upon the character and fitness to practice law of an applicant for bar admission under SCR 40.03.

## Rules of the Wisconsin Board of Bar Examiners

### BA 6.02 Relevant conduct or condition.

The revelation or discovery of any of the following should be treated as cause for further inquiry before the Board decides whether the applicant possesses the character and fitness to practice law:

. . .
(b) academic misconduct
. . .
(d) acts involving dishonesty or misrepresentation
. . .

### BA 6.03 Use of information.

The Board will determine whether the present character and fitness of an applicant qualifies the applicant for admission. In making this determination through the processes described above, the following factors should be considered in assigning weight and significance to prior conduct:

(a) the applicant's age at the time of the conduct
(b) the recency of the conduct
(c) the reliability of the information concerning the conduct
(d) the seriousness of the conduct
(e) the mitigating or aggravating circumstances
(f) the evidence of rehabilitation
(g) the applicant's candor in the admissions process
(h) the materiality of any omissions or misrepresentations
(i) the number of incidents revealing deficiencies

## IN RE RADTKE v. BOARD OF BAR EXAMINERS

601 N.W.2d 642 (Wis. 1999)

Per Curiam.

We review . . . the decision of the Board of Bar Examiners (Board) declining to certify that Terry George Radtke satisfied the character and fitness requirement for admission to the Wisconsin bar. . . .

[T]he Board properly concluded . . . that Mr. Radtke failed to meet his burden . . . to establish the requisite moral character and fitness to practice law. . . . Prior to his graduation from Marquette University School of Law in May 1998, Mr. Radtke was a lecturer in the Department of History at University of Wisconsin-Milwaukee (UWM) from August 1984 to May 1991. [I]n the fall of 1990 he had prepared a paper

and submitted a version of it for publication to a number of journals, including the Business History Review. He explained that the paper . . . "did not include several key cites to secondary sources in the bibliography and paraphrased several sources that were not quoted." He stated that he "simply forgot to include the necessary footnotes in the paper" and asserted that the allegation that he had engaged in "professional plagiarism" arose from a letter the editors of Business History Review sent to the UWM History Department chair about the missing citations. . . .

. . . In respect to the alleged plagiarism, Mr. Radtke asserted that he had not provided source citations to materials quoted in his paper and to various facts . . . , most of which he had taken from secondary articles. He acknowledged that he should have mentioned those articles as sources.

. . . Mr. Radtke's descriptions of his paper were at variance with the evidence. . . . Mr. Radtke deliberately had copied a substantial portion — more than half — of his article from other people's work, presented it as his own, and lied to the Board.

. . . Mr. Radtke minimized his conduct by characterizing what he did as "paraphras[ing] several sources that were not quoted" and having "simply forgot[ten] to include the necessary footnotes" and "several key cites to secondary sources in the bibliography." The argument that if he had intended to plagiarize, he would not have set forth text from scholarly journals verbatim, thereby running the risk of detection by any person knowledgeable in the field, is disingenuous. . . .

Mr. Radtke has failed to establish that any of the Board's findings is clearly erroneous. Each of the foregoing findings of fact is adequately supported by the credible evidence and the reasonable inferences that can be drawn from it. . . .

Mr. Radtke's final argument . . . asserted that the Board erred in concluding that his unprofessional conduct and incomplete and untruthful disclosures were relevant to his character and fitness because it failed to take into consideration each of the nine factors listed in BA 6.03. We find no merit to that argument. First, Mr. Radtke incorrectly stated that the Board considered only two factors — the seriousness of his conduct and his candor in the admission process. In fact, the Board also explicitly considered the lack of evidence of his rehabilitation and the materiality of his omissions in the admission process. Second, we rejected the same argument in Saganski v. Board of Bar Examiners, 595 N.W.2d 631 (Wis. 1999), holding that it is sufficient that the Board consider those BA 6.03 factors that are applicable to the conduct of the applicant.

[W]e affirm the Board's determination declining to certify Mr. Radtke's character and fitness for bar admission. [In considering] the effect Mr. Radtke's conduct in the plagiarism incident and in the bar admission application process has on his eligibility to reapply for bar admission . . . , we take into account Mr. Radtke's professional record during the eight years following the plagiarism incident. Mr. Radtke . . . admitted his mistake in the submission of his article for publication and took full responsibility for it, subsequently published the article with proper footnotes, published a book, completed his doctoral thesis and obtained his doctorate, and earned a law degree. He did all of that without any allegation of questionable conduct.

While Mr. Radtke's recent characterizations of the plagiarism incident and the impact it had on his professional employment cause great concern . . . , we determine that Mr. Radtke should be permitted to reapply for bar admission. [A] one-year period is the appropriate time for him to wait before reapplying.

## IN RE ZBIEGIEN

433 N.W.2d 871 (Minn. 1988)

Per Curiam.

[The petitioner has graduated from law school and has applied for admission to the bar of this state.]

[In a law school seminar in products liability, the petitioner submitted a draft paper that] was plagiarized in large part from the works of other authors. Nearly all of the first 12 pages were taken verbatim or nearly verbatim from a number of law review articles without proper citation in the endnotes. In addition, some endnotes were taken from other sources in such a way as to give the appearance that they were petitioner's own work. Several other portions of the paper were paraphrased or had words or phrases omitted or substituted for the originals as they appeared in various published sources. Again, no proper citation was given. . . . [The petitioner received] a course grade of "F". . . .

[The petitioner] admitted the extensive plagiarism . . . both in the form of direct quotes not properly indented and footnoted and paraphrased passages not appropriately credited to the original sources. [He said that his computer printer had not been printing properly, and he did not proofread the paper as it came out of the printer because at the time his wife was disabled from an auto accident, and his teenage son had ran away from home.] . . .

The [State Board of Law Examiners, however,] found that . . . petitioner plagiarized a substantial amount of text and footnotes taken verbatim, or nearly verbatim, from various published sources without proper identification [and] that the alleged computer problems did not explain away the plagiarism. . . .

Petitioner appeals from that determination. . . .

Rule II.A of the Minnesota Rules of the Supreme Court for Admission to the Bar provides that an applicant must establish good character and fitness to the satisfaction of the Board.

"Good character" is defined as "traits that are relevant to and have a rational connection with the present fitness or capacity of an applicant to practice law." Definition 4, Minn. R. Admis. Bar (1986). . . .

Plagiarism, the adoption of the work of others as one's own, does involve an element of deceit, which reflects on an individual's honesty. . . . The petitioner clearly plagiarized large sections of his paper. [Plagiarism] is an affront to honest scholars everywhere and to other members of [a law school] class whose legitimate pursuits would be weighed against this appropriated material. Petitioner was guilty of this act. . . .

It is the view of this court that [this] petitioner's conduct, wrongful though it was, does not demonstrate such lack of character that he must be barred from

the practice of law. He has been punished [already in practical terms because the Board's investigation has delayed his admission to the bar] for over a year. [In dealing with law school officials and when testifying before the Board, the petitioner was filled with genuine remorse and shame.] We . . . believe that this conduct will not be repeated. We hold that, under the facts and circumstances of this case petitioner will not be barred from the practice of law. . . .

KELLEY, J [dissenting].

. . . When this court admits an applicant to the practice of law, it certifies to the public that . . . it knows of no reason why the applicant-admittee does not possess the character which the profession demands of all admitted attorneys in this state. We judge an applicant's character by the standard that it must reflect those traits of integrity, honesty and trustworthiness necessary for a lawyer to possess when he or she represents clients, when dealing with professional peers, and when appearing before the courts. Yet, in this case, notwithstanding that we know that this petitioner has . . . recently engaged in outright dishonesty by plagiarizing and claiming as his own the intellectual works of others with no attempt at appropriate attribution of source, the majority would conclude, even as it condemns the petitioner's conduct, that he has been "punished" enough by the delay in his admission. . . .

[D]enial of admission . . . has not as its purpose punishment but rather protection of the public and the integrity of the legal system. . . .

Even though I would deny the petition, I would not foreclose forever, petitioner's admission to the Bar. I would, however, require that he prove that after a reasonable period of time had elapsed he then . . . demonstrates that from the experience he has learned to conduct his affairs in a manner that this court can, with confidence, certify to the public that his character does reflect traits of integrity and trustworthiness.

## IN RE LAMBERIS

443 N.E.2d 549 (Ill. 1982)

SIMON, J.

[The respondent is a lawyer admitted to the bar of this state.]

In writing a thesis which he submitted to [a law school] in satisfaction of a requirement for a [post-J.D.] master's degree in law, the respondent [while a member of the bar] "knowingly plagiarized" . . . [i]n preparing pages 13 through 59 of his 93-page thesis [by using two books' words] substantially verbatim and without crediting the source. . . .

The purpose for which respondent used the appropriated material . . . displays a lack of honesty which cannot go undisciplined, especially because honesty is so fundamental to the functioning of the legal profession. . . .

[Under] DR 1-102(A)(4) of the [Illinois Code of Professional Responsibility] "[a] lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." . . .

Having decided that the respondent's conduct warrants some discipline, we must decide whether to impose disbarment, suspension or censure. The Hearing Board recommended censure; the Review Board recommended suspension for six months; and the Administrator argues here for disbarment. . . .

[I]n the 10 years since respondent entered private practice, no client has ever complained about his conduct, professional or otherwise. . . .

[Although] the respondent's conduct undermined the honor system that is maintained in all institutions of learning[, the law school involved] has already . . . expelled [him], an act which will also undoubtedly ensure that the respondent will be hereafter excluded from the academic world.

In view of the respondent's apparently unblemished record in the practice of law and the disciplinary sanctions which have already been imposed by [the law school], we choose censure as the most appropriate discipline for the respondent.

## IN RE WIDDISON

539 N.W.2d 671 (S.D. 1995)

GILBERTSON, J.

[The applicant has graduated from law school and applied for admission to the bar of this state.]

[During his] second year of law school, he wrote and submitted a casenote for law review publication [which] included . . . material from secondary sources which he had failed to cite. . . . The faculty advisor . . . assigned [the applicant] a failing grade in the law review course. . . .

[After the applicant took the final exam in the course on Worker's Compensation, the professor discovered two students' examination answers] were strikingly similar. . . . [T]he professor assigned a failing grade to each examination[, one of which was the applicant's].

[The applicant] has the burden of proving by clear and convincing evidence his qualifications for admission to practice law in this state. . . . One of those qualifications is that he "be a person of good moral character." SDCL 6-16-2. SDCL 16-16-2.1 defines "good moral character" as including, but not limited to, "qualities of honesty, candor, trustworthiness, diligence, reliability, observance of fiduciary and financial responsibility, and respect for the rights of others and for the judicial process." That statute also provides that "*[a]ny* fact reflecting a deficiency of good moral character may constitute a basis for denial of admission." SDCL 16-16-2.1 (emphasis added). Good moral character is a prerequisite to practice law in every state. . . .

"The state bears a special responsibility for maintaining standards among members of the licensed professions" such as attorneys at law. [Citations omitted.] . . . The same zeal to protect the public from the unfit within the bar must also be applied to the unfit who would seek to enter the bar. . . .

[The applicant] has not met his burden of proving good moral character. [We affirm the order denying his application for admission to the bar], with leave to

reapply at a future date provided [the applicant] is able to rectify his character deficits and show he has gained an understanding of, and the ability to put into practice, the qualities of honesty, candor, and responsibility required [of lawyers].

## Exercise B
## The Ironwood Tract

Fourteen years ago, Palo Verde Development Corporation purchased a deed to an Arizona parcel known as the Ironwood tract. The tract is unimproved terrain. It has never been fenced, and nobody has ever constructed a building or anything else on it. It is one mile from a paved road and 65 miles from downtown Phoenix.

Today, the nearest residential development is Verde River Estates, nine miles from the tract, toward Phoenix along the same road. From the date of the purchase until this past September, no employee of Palo Verde had set foot on the tract.

Palo Verde built Verde River Estates during the last two years. The company had planned to build next on the Ironwood tract. When the last Verde River Estates units were sold in September, the company sent a surveying team to the Ironwood tract, but they were chased off the land by Homer Chesbro, whose Black Canyon Ranch adjoins the Ironwood tract.

Chesbro bought the Ranch eleven years ago from a person who told him that he was buying both the Ranch and the tract. Although the metes and bounds description in Chesbro's deed does not include the tract, that together with most of the rest of the deed is in language that only lawyers can understand.

For the past eleven years, Chesbro and his employees have grazed cattle on the Ironwood tract two or three times a month throughout the year. The land cannot support more grazing, and the soil will not support farming or other intensive agriculture, although luxury housing could be built on it.

Chesbro had no idea that Palo Verde had a deed to the property. And Palo Verde didn't know that Chesbro was using the tract or that he thought his deed included it.

If Chesbro claims that he acquired title by adverse possession, will Palo Verde succeed in an action to eject him and quiet its own title? Your research has uncovered three statutes and five cases.

### ARIZONA REVISED STATUTES

#### § 12-521. Definitions

A. In this article, unless the context otherwise requires:

1. "Adverse possession" means an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.

2. "Peaceable possession" means possession which is continuous, and not interrupted by an adverse action to recover the estate. . . .

### § 12-526. Real Property in Adverse Possession and Use by Possessor; Ten-Year Limitation . . .

A. A person who has a cause of action for recovery of any lands, tenements or hereditaments from a person having peaceable and adverse possession thereof, cultivating, using and enjoying such property, shall commence an action therefor within ten years after the cause of action accrues, and not afterward. . . .

### § 12-527. Effect of Limitation on Title

When an action for recovery of real property is barred by any provision of this article, the person who pleads and is entitled to the bar shall be held to have full title precluding all claims.

[These sections are descended from provisions in the Arizona Civil Code of 1901. The Arizona Supreme Court has held that what is now § 12-527 provides a cause of action through which a person who occupies land through adverse possession can obtain title to it after the requisite number of years have passed. *Work v. United Globe Mines*, 100 P. 813 (Ariz. 1909), *aff'd*, 231 U.S. 595 (1914). Because the Arizona statutes reproduced above were modelled after Texas statutes, the *Work* court relied on a Texas case, *Moody v. Holcomb*, which interpreted those Texas statutes. *Moody* was decided before 1901. Compare *Work* to the first two cases below, *Arizona Superior Mining Co. v. Anderson and State v. McDonald*. Added together, these three cases tell you how the Arizona courts will react to the other out-of-state cases in this exercise.]

### ARIZONA SUPERIOR MINING CO. v. ANDERSON
262 P. 489 (Ariz. 1927)

[The parties disagree over whether this case should be tried in Pima County or Maricopa County. The relevant Arizona venue statute is ambiguous.]

Counsel . . . have directed our attention to decisions [interpreting similar statutes in other states, but we are free to disregard precedent from states where] the language of the statute . . . is different from the language of our statute. [The situation is different where the other state's statute is the one from which our statute is drawn. In adopting our statute] from another state, we took it with the construction theretofore placed upon it [by the courts of that state].

### STATE v. MCDONALD
352 P.2d 343 (Ariz. 1960)

[The issue is whether the plaintiff can be made to pay the fees and expenses of the defendant's expert witnesses. The relevant Arizona statute, A.R.S. § 12-1128, is ambiguous.]

A.R.S. § 12-1128 was adopted from California [in 1901. After that date, two California cases interpreted the original California statute to mean] the usual costs attending trial allowed by statute. [Citations omitted.] . . .

Although we are not bound to follow the interpretation [afterward] placed on a statute by [the] state from which our statute [had earlier been] adopted, it is persuasive. [Citation omitted.] . . .

## ADAMS v. LAMICQ

221 P.2d 1037 (Utah 1950)

This action was commenced by the appellant to quiet title to an eighty acre tract of land in Duchesne County, Utah. . . .

[T]he respondents claimed title to the land . . . by virtue of seven years' adverse possession[, during which they used the land as a winter range for sheep].

The . . . tract in question consisted of unbroken and unimproved brush lands suitable only for grazing. . . . The property was [not inclosed by a fence. T]he respondents during the winter grazed all of the eighty acres . . . , entering thereon in November and remaining until April, at which time they moved their sheep onto higher grazing lands in Colorado for the summer and early autumn. The respondents did not leave anyone upon or in charge of the eighty acres during the summer months while they were away. . . .

. . . Sec. 104-2-9, Utah Code Annotated 1943, provides: "For the purpose of constituting an adverse possession . . . , land is deemed to have been possessed and occupied in the following cases: . . . (3) Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant." (Italics added.)

In *Kellogg v. Huffman*, 137 Cal. App. 278, 30 P.2d 593, it was held under Sec. 323, subd. 3, Cal. Code Civ. Proc., which is identical to Section 104-2-9, subd. 3, quoted above, that pasturing during the entire grazing season of each year during which feed is available, if done to the exclusion of others, is a sufficient use and occupation of land, which is reasonably fit for grazing purposes only, to constitute the occupation and possession necessary to establish title by adverse possession. . . .

Thus we conclude that the respondents . . . had continuously claimed, occupied, and used [the property] for at least seven years prior to the commencement of this action. . . .

## KELLOGG v. HUFFMAN

30 P.2d 593 (Cal. Ct. App. 1934)

This is an action to quiet title to 160 acres of land in the Kettleman Hills in Fresno county. . . . This property was rough and arid and was situated in what was, until about 1929, a sparsely settled country used only for grazing purposes. . . .

The appropriate portion of section 323 of the Code of Civil Procedure reads as follows: " . . . For the purpose of constituting an adverse possession . . . land is deemed to have been possessed and occupied in the following cases: . . .

(3) Where, although not inclosed, it has been used for the supply of fuel, or of fencing-timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant."

. . . To establish adverse possession it is only necessary that land be put to such use as can reasonably be made thereof, and such a use is sufficiently continuous if, during the required time, it be so used at all times when it can be used for the purpose to which it is adapted. [Citations omitted.] It is well settled in this state that pasturing during the entire grazing season of each year during which feed is available, if done to the exclusion of others, is a sufficient use and occupation of land, which is reasonably fit only for pasturage purposes, to constitute the occupation and possession necessary to establish a title by adverse possession. [Citations omitted.] . . . ". . . It is sufficient that the use is in accordance with the usual course of husbandry in the locality." [Citation omitted.]

[There was ample evidence of adverse possession through use of the land for grazing purposes.]

## DE LAS FUENTES v. MACDONELL

20 S.W. 43 (Tex. 1892)

This was an action on trespass to try title. . . .

Appellants . . . complain that the court erred in sustaining the defendant's plea of the statute of limitations of five years. . . . The [land] was never inclosed [by fences]. It is fit only for grazing purposes. There have never been any houses upon it. No part of it has ever had any inclosures upon it, except small pens, made of posts and brush, for the purpose of penning sheep. These were renewed every year. . . . The land was used for "grazing and lambing purposes." How many sheep were kept upon it does not appear. One witness states that in 1871 there were 13,000 sheep upon the land. . . . Cattle belonging to others were permitted to graze upon the land. . . .

There have been several cases decided in this court in which the effort has been made to show an adverse possession of land by merely grazing cattle and horses upon it, but it has uniformly been held that the possession was not sufficient to meet the requirements of the statute. [Citations omitted.]

[T]he mere occupancy of land by grazing live stock upon it, without substantial inclosures or other permanent improvements, is not sufficient to support a plea of limitation under our statutes. Uninclosed land, in this state, has ever been treated as commons for grazing purposes; and hence the mere holding of live stock upon it has not been deemed such exclusive occupancy as to constitute adverse possession. . . . There must be "an actual occupation of such nature and notoriety as the owner may be presumed to know that there is a possession of the land" [citation omitted]; "otherwise, a man may be disseised without his knowledge, and the statute of limitations run against him, while he has no ground to believe that his seizure has been interrupted" [citation omitted].

We think the testimony insufficient to show adverse possession. . . .

# Appendix Precedent Analysis Exercise

## Emil Risberg's Diary

Returning from an expedition across the Arctic ice cap in the nineteenth century, Emil Risberg and his companions became stranded at the northern tip of Greenland. After several weeks they all died of scurvy and exposure. A few years later, their hut was found, their bodies were buried at sea, and their possessions were returned to their families. Emil Risberg's widow received, among other things, his diary.

Risberg had measured the group's geographic position every day during the expedition, and he recorded those measurements, as well as a mass of other detail, in his diary. His measurements showed that he and the group he led had travelled farther north than anyone else had gone at the time. The diary brought Risberg much posthumous fame, and it wasn't until early in the twentieth century that any explorer got closer to the north pole. The diary was passed on in Risberg's family through inheritance. Four years ago, when the diary became controversial, it was owned by Risberg's great-granddaughter, Olga Risberg.

Controversy began when a researcher named Sloan announced that Risberg had faked his measurements and that he could not possibly have gotten as far north as the diary showed. Sloan supported his argument with a large amount of scientific evidence involving things like the ocean currents that shift the ice pack and the distances that can be travelled in a day over ice. Olga Risberg took this very badly.

Within a month or two, she went to the officers of the New York Geographical Society, whom she had never met before. She gave them the diary, together with a letter that contained the following sentence:

> I donate my great-grandfather's diary to the Society because I believe the Society is best situated to evaluate the measurements recorded in it and to establish once and for all that Emil Risberg went where he claimed to have gone.

No officer of the Society signed a contract obligating it to do the study in exchange for the gift. The Society had not asked Olga Risberg to make a gift of the diary, and no one at the Society said anything to her about conducting a study or about her motivation for the gift. At the time, the diary had an appraised value of $15,000.

Olga is an architect living in a suburb of Minneapolis. The total value of her home, car, and savings greatly exceeded (and still greatly exceeds) $15,000.

The Society did nothing to evaluate the diary. Two years ago, Olga demanded that the Society either resolve the controversy or return the diary to her. The Society replied in a letter that, among other things, stated the following:

> When you donated the diary to the Society, you expressed some hope that it would be evaluated. But the Society made no promise — orally or in writing — to study the controversy surrounding the diary. If and when our board of directors chooses to go ahead with a study, we will do so, but you made a gift, which we accepted without conditions.

Sloan has just died. In his papers are notes showing that he had faked his own measurements, that he had started the controversy to build his reputation, and that all along he had believed that Risberg's diary was accurate. Olga has been besieged with offers to buy the diary from people who were unaware that she had donated it to the Society. All of the offers are well into six figures.

Olga Risberg is your client. She wants the Society either to complete an objective and thorough study very soon or to reconvey title to the diary back to her so that she can either sell it or have somebody else do the study. She will be satisfied with either, and she is willing to sue.

You have concluded that the gift cannot be set aside on the grounds of fraud. You are now exploring whether Olga Risberg will be able to persuade a court to impose a constructive trust on the Society's title to the diary. You have learned from *Sharp v. Kosmalski* that the elements of a constructive trust are "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment."

All four elements are disputed because the Society concedes none of them. But for this exercise, we'll focus on the first element alone — whether the relationship between Olga Risberg and the Society was "confidential or fiduciary."

Of all the cases you found while researching, the three in Parts 1, 2, and 3 below are most closely on point.

## Part 1

Read *Sharp v. Kosmalski* below. On the question of what a "confidential or fiduciary relationship" means, what rule or rules does *Sharp* stand for? What policy or policies does it stand for?

### SHARP v. KOSMALSKI
351 N.E.2d 721 (N.Y. 1976)

GABRIELLI, J.

Upon the death of his wife of 32 years, plaintiff, a 56-year-old dairy farmer whose education did not go beyond the eighth grade, developed a very close relationship with defendant, a school teacher and a woman 16 years his junior. . . . Plaintiff came to depend upon defendant's companionship and, eventually, declared his love for her, proposing marriage to her. Notwithstanding her refusal of his proposal of marriage, defendant continued her association with plaintiff and permitted him to shower her with many gifts, fanning his hope that he could induce defendant to alter her decision concerning his marriage proposal. Defendant was given access to plaintiff's bank account, from which . . . she withdrew substantial amounts of money. Eventually, plaintiff . . . executed a deed naming her a joint owner of his farm. . . . [N]umerous alterations . . . were made to plaintiff's farmhouse in alleged furtherance of "domestic plans" made by plaintiff and defendant.

In September, 1971, while the renovations were still in progress, plaintiff transferred his remaining joint interest to defendant. . . . In February, 1973, . . . defendant ordered plaintiff to move out of his home and vacate the farm. Defendant took possession of the home, the farm and all the equipment thereon, leaving plaintiff with assets of $300.

Generally, a constructive trust may be imposed "[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest" [citations omitted]. In the development of the doctrine of constructive trust as a remedy available to courts of equity, the following four requirements were posited: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment [citations omitted].

. . . The record in this case clearly indicates that a relationship of trust and confidence did exist between the parties and, hence, the defendant must be charged with an obligation not to abuse the trust and confidence placed in her by the plaintiff. . . .

. . . Even without an express promise . . . courts of equity have imposed a constructive trust upon property transferred in reliance upon a confidential relationship. In such a situation, a promise may be implied or even inferred from the very transaction itself. As Judge Cardozo so eloquently observed: "Though a promise in words was lacking, the whole transaction, it might be found, was 'instinct with an obligation' imperfectly expressed (Wood v. Duff-Gordon, 222 N.Y. 88, 91)" (Sinclair v. Purdy, 235 N.Y. 245, 254 . . .). . . .

. . . Indeed, in the case before us, it is inconceivable that plaintiff would convey all of his interest in property which was not only his abode but the very means of his livelihood without at least tacit consent upon the part of the defendant that she would permit him to continue to live on and operate the farm. . . .

The salutary purpose of the constructive trust remedy is to prevent unjust enrichment. . . . A person may be deemed to be unjustly enriched if he (or she) has received a benefit, the retention of which would be unjust. . . . This case seems to present the classic example of a situation where equity should [impose a constructive trust in response to] a transaction pregnant with opportunity for abuse and unfairness. . . .

## Part 2

Read *Sinclair v. Purdy*, below. On the question of what a "confidential or fiduciary relationship" means, what rule or rules does *Sinclair* stand for? What policy or policies does it stand for?

### SINCLAIR v. PURDY
139 N.E. 255 (N.Y. 1923)

CARDOZO, J.

. . . Elijah F. Purdy [owned a half] interest in real estate in the city of New York. . . . Elijah was a clerk of what was then known as the Fifth District Court. His ownership of real estate subjected him to constant importunities to go bail for those in trouble. The desire to escape these importunities led him to execute a deed conveying his undivided half interest to his sister Elvira[, who already owned the other half]. . . . The relation between [brother and sister] was one of harmony and affection, and so continued till the end. . . . There is evidence of repeated declarations by Elvira that, though the [whole] title was in her name, a half interest was his. . . . Elijah died at the age of 80 in 1914. [A niece, who would have inherited from Elijah, brought this suit to establish a trust in favor of Elijah — and thus in favor of the niece — over the property deeded to Elvira.]

. . . The sister's deposition shows that her brother disclosed his plan to her before the making of a deed. . . . It was an expedient adopted to save him the bother of going upon bonds. She does not remember that she made any promise in return. He trusted, as she puts it, to her sense of honor. A little later she learned that the title was in her name.

We think a confidential relation was the procuring cause of the conveyance. The grantor could not disclose the trust upon the face of the deed. If he had done so, he would have defeated the purpose of the transfer, which required that title, to outward appearance, be vested in another. He found, as he thought, in the bond of kinship a protection as potent as any that could be assured to him by covenants of title. . . . "The absence of a formal writing grew out of that very confidence and trust, and was occasioned by it." [Citation omitted.]

In such conditions, the rule in this state is settled that equity will grant relief. [Citations omitted.] . . .

. . . Here was a man transferring to his sister the only property he had in the world. . . . He was doing this, as she admits, in reliance upon her honor. Even if we were to accept her statement that there was no distinct promise to hold it for his benefit, the exaction of such a promise, in view of the relation, might well have seemed to be superfluous. . . . Though a promise in words was lacking, the whole transaction, it might be found, was "instinct with an obligation" imperfectly expressed (Wood v. Duff-Gordon, 222 N.Y. 88, 91). It was to be interpreted, not literally or irrespective of its setting, but sensibly and broadly with all its human implications. . . .

## Part 3

Read *Tebin v. Moldock* below (two opinions). The first opinion is from an intermediate appellate court. The second is from the state's highest court. On the question of what a "confidential or fiduciary relationship" means, what rule or rules does the case stand for? What policy or policies does it stand for?

### TEBIN v. MOLDOCK

241 N.Y.S.2d 629 (App. Div. 1963)

BREITEL, J.P.

. . . Plaintiffs are the son, sister and two brothers of a New York decedent, all of whom are residents of Poland. Defendant is decedent's niece, and a native-born American. Decedent emigrated to the United States from Poland in 1913. She died in 1956, a widow, leaving only plaintiff son as a surviving descendant. The action was to impose a constructive trust, in favor of plaintiffs, of certain funds deposited in savings institutions, and a multiple dwelling. The assets had once belonged to decedent but she, in the last five years of her life, had transferred them to defendant niece. . . .

[We hold that] a constructive trust [must] be imposed on the . . . assets of decedent in the hands of defendant niece. While the evidence does not establish fraud or undue influence, it does inescapably establish that the assets were transferred on certain promises to hold for the benefit of the son, which promises were made in a confidential relationship. These promises were relied upon, and for their breach equity is bound to provide appropriate relief.

Hermina Tebin, the decedent, was born in Poland in 1882. She married there, but later separated from her husband, left her two sons with her parents, and emigrated to the United States in 1913. One son died in 1920 without issue. The other, who was born in 1904, is the first-named plaintiff in this action.

Since coming to this country decedent lived in New York, earned her livelihood as a midwife, acquired the lower east side multiple dwelling in which she lived, and accumulated cash funds in the amount of about $19,000. During this period of over 40 years, she saw her son in Poland once when she travelled there in 1928, and stayed for some two months. She maintained an intermittent correspondence with him throughout and until the end of her life. . . .

In 1920, decedent brought her sister Aniela to the United States. . . . Defendant niece is Aniela's daughter, whom decedent knew as a growing child, befriended and assisted as a young woman training for an educational career, and who, in decedent's later years, handled her moneys and affairs when illness and age closed in.

[Decedent's health began to deteriorate in 1947. In 1951, she gave bank accounts and a deed to the multiple dwelling to the niece, who signed an] agreement [providing] that decedent should retain the use, free, of her apartment, and receive for her life the net income from the property less a management fee to the niece. The [agreement] recited that the niece was the sole and entire owner of the property.

In August 1951 decedent made a will in which the niece was named as the sole beneficiary of her estate. It contained the following clause:

> Third: I have given certain oral instructions to my said niece, with respect to my son Kazimierz Tebin, and having full faith and confidence in her honesty and integrity, I feel certain that she will carry out my instructions. Nonetheless, in the event that she fails to carry out my instructions, it shall be a matter for her own conscience and not otherwise.

As decedent's end approached, the niece handled more and more of the aunt's affairs, faithfully, and paid all her expenses of living, hospitalization and medical services, out of the funds theretofore transferred to the niece. After the aunt's death, the niece from the same sources paid the funeral expenses. . . .

Presently, the niece holds the real property and about $14,000 of roundly $19,000 transferred to her.

Plaintiffs assert that the niece and her mother frightened decedent with the representation that if any assets were ever received by the son, he being in a Communist country, the assets would be taken from him and that Stalin would kill him. . . .

Plaintiffs also claim that the assets were transferred to the niece on her promise that she would hold them for decedent's son and advance funds as he needed and could profitably use them.

The niece and her mother assert that the relation between the decedent and her son was not a close one, the decedent often complained of the greediness of the son and his persistent and exclusive interest in receiving remittances and gifts. Moreover, it is asserted that the niece was to send moneys to the son only in her exclusive discretion and judgment, and never in excess of $25 in any one month. . . .

In July, 1952 decedent came to Mr. Solon, a lawyer, and retained him to recover her property. . . . Decedent had told Mr. Solon the Stalin story and that she had transferred the assets to the niece to provide her lifetime needs and take care of her son. While there were some ensuing conversations about bringing a lawsuit nothing further was done to prosecute the matter. . . .

The niece testified that decedent told her:

> that she was an older woman, that she wanted someone . . . who would look after her needs while she was alive [and] that all during her lifetime [her son] had always written to her and asked her to help, and that since she was giving me everything she had, she thought that he probably would, after her death, seek me out and ask me for help, and she asked me to see that he never got his hands on any lump sum of money. That is why she was giving it to me. But she knew that if he would write to me and ask me for help, and if I felt that he needed it, that I would help him. . . .

In August, 1952 decedent wrote to her son in Poland:

> I was very sick with my heart [because] Aniela and her daughter Janina scared me by telling me that if I leave my estate to you Stalin will take it away from you after I die and that . . . you may be shot to death. So I gave all to Janka — $14,000 and a house and now they are trying to commit me to an insane asylum so they could keep everything for themselves. I will try to have you come here and take it all back because they stole it from me by fraud and they bribed the lawyer.
>
> Keep this letter so that you could appear as a witness if necessary. . . .

It is evident . . . that a secret agreement had been effected between aunt and niece for the benefit of the aunt during her lifetime, and the son. . . .

[A constructive trust will be imposed where] the one who entrusted property did so because of certain understandings, and the one to whom the assets are given acquiesced even in silence (e.g., Sinclair v. Purdy, 235 N.Y. 245, 253-254 . . .). . . .

In dealing with the problem of a secret trust or the breach of a confidential relationship the ordinary rules imposed by the Statute of Frauds . . . are not applicable. Equity in this area has always reached beyond the facade of formal documents, absolute transfers, and even limiting statutes on the law side. . . .

Accordingly, the judgment . . . should [provide] for a constructive trust in [the son's] favor. . . .

TEBIN v. MOLDOCK
200 N.E.2d 216 (N.Y. 1964)

PER CURIAM.

[On appeal, the] judgment should be modified to limit the scope of the constructive trust imposed on defendant Janina Moldock to an obligation to pay $25 a month for the benefit of Kazimierz Tebin. . . .

[W]e conclude the record supports a finding that defendant, occupying a relationship of confidence and trust with decedent, undertook to devote a small part of the property given to her for the benefit of plaintiff. On the basis of defendant's own testimony this would approximate $25 a month. No such breach of confidence or of fiduciary obligation, either before or after decedent's death, has been established as would warrant forfeiture by defendant of the major interest in decedent's property which it was clearly decedent's intent that defendant should have.

## Part 4

Is there a way of synthesizing some or all of these cases so that they stand for a unified view of the law? Don't feel bound to your previous answers about the rules and policies that each case stands for. When you think about the three together, you might — or might not — see a bigger picture.

## Part 5

Compare Olga Risberg's facts to those in each case in this Exercise. Are they analogous? Distinguishable?

## Part 6

Based on your answers to Parts 1 through 5, how do you think a court would rule on the issue of whether Olga Risberg and the Society had a "confidential or fiduciary relationship"? This is your tentative prediction.

## Part 7

Will the tentative prediction you made in Part 6 seem reasonable, just, and realistic to a judge on a human level?

## Part 8

Based on your answers to Parts 1 through 7, how will the court resolve the issue of whether Olga Risberg and the Society had a "confidential or fiduciary relationship"? This is your final prediction.

# Appendix Sample Office Memorandum

This appendix contains an office memorandum of the type described in Chapter 16.

To: Theresa Wycoff

From: Christine Chopin

Date: March 1, 2026

Client: Eli Goslin

Re: Constructive trust

## ISSUE

Will a constructive trust in favor of Eli Goslin be imposed on the title to his home and only asset, where (1) he deeded the home over to his nephew after the nephew promised to make the remaining three years of payments to prevent foreclosure, (2) Goslin made no statement at the time that would reveal his reasons for giving the deed, and (3) the nephew has since then threatened to throw Goslin out of the home?

## BRIEF ANSWER

A New York court will probably impose a constructive trust in Goslin's favor on the nephew's title to the house. Goslin is able to prove each of the four elements of the New York test for a constructive trust: (1) a confidential or fiduciary relationship between Goslin and his nephew; (2) a promise, implied by the nephew's actions, to hold title while allowing and helping Goslin to live in the house; (3) Goslin's transfer of title to the nephew in reliance on that promise; and (4) unjust enrichment by the nephew if the promise is broken. New York courts have uniformly held these elements to be satisfied where — as happened here — a person in a vulnerable situation deeds the bulk of her or his assets to someone like a trusted relative who pays either nothing or a fraction of the property's fair value.

## FACTS

Eli Goslin, the client, is a 74-year-old arthritic widower who has been retired for 12 years and whose only income is from Social Security. His sons are both in the military and are frequently stationed for long periods overseas. His daughter lives in Singapore.

Until last year, he also had income from an investment, but when that business went bankrupt, he became unable to meet the mortgage payments on his house. The house was Goslin's only asset. He has lived there for 24 years, and when these events occurred, the mortgage had only three more years to run. He has no other place to live.

After Goslin found that he could no longer pay the mortgage, Herbert Skeffington, a nephew, offered to make the remaining $11,500 in payments as they became due. Within a few days afterward, Goslin, without stating his purpose to anyone, gave a deed to the property to Skeffington

and got the bank to agree to transfer the mortgage to him. At the time, the house was worth approximately $95,000 and was unencumbered except for the mortgage that Skeffington had offered to pay. Aside from the promise to make mortgage payments, Skeffington gave no value connected to the deed.

Goslin has told us that he made the deed for the following reason: "At the time, it seemed like the right thing to do. He was going to pay the mortgage, and after a certain point — maybe after I'm gone — the place would become his. I didn't think it would end up like this." Skeffington had not asked for a deed, and Goslin arranged for the deed before telling the nephew about it. Goslin knew at the time that Skeffington would not need a deed to make the mortgage payments. The bank would have been willing to accept Skeffington's check if it were accompanied by Goslin's payment stub, or, alternatively, Skeffington could simply have given the money to Goslin, who could in turn have paid the bank.

As far as Goslin knows, Skeffington has made the payments as they have become due.

At the time of the deed, neither party had said anything about changing the living arrangements in the house. Goslin had continued to live alone there until a few weeks ago, when Skeffington's rental apartment was burned out and he moved, along with his wife and two children, into the house. Goslin neither agreed to nor protested this. A few days later, Skeffington ordered Goslin to move out, which Goslin has refused to do. Since then, Skeffington has, at the top of his voice, frequently repeated the demand. While yelling at Goslin, Skeffington has twice, with the heels of his palms, suddenly shoved Goslin in the chest and sent him staggering. Skeffington has threatened to strike Goslin again and to pack up Goslin's belongings and leave them and Goslin on the sidewalk. Skeffington takes the position that his family has no other place to go, and that the house is the only thing he owns.

Skeffington is 36 years old, and throughout Skeffington's life, he and Goslin have seen each other at least monthly at family get-togethers, including each other's weddings. Seventeen years ago, Goslin contributed $3,200 to Skeffington's college tuition. The two of them have never discussed whether this was to be treated as a gift or a loan, and Goslin does not recall which he intended or even whether he had an intent at the time. He says that he considered both the tuition money and his nephew's offer to pay the mortgage to be "the sort of thing people in a family do for each other." In any event, except for the mortgage payments, the nephew has never given Goslin money directly or indirectly, and he has not announced an intention to compensate Goslin for the tuition money.

## DISCUSSION

Goslin will probably be able to get a constructive trust imposed on his nephew's title to the house.

Under New York law, a constructive trust will be imposed where the record shows "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment." *McGrath v. Hilding*, 363 N.E.2d 328, 330 (N.Y. 1977); *Beason v. Kleine*, 947 N.Y.S.2d 275, 277 (App. Div. 2012). These elements are flexible, however, and New York courts will impose a constructive trust even if not all of the elements are established. *Simonds v. Simonds*, 380 N.E.2d 189, 193-94 (N.Y. 1978); *Rowe v. Kingston*, 942 N.Y.S.2d 161, 163 (App. Div. 2012).

Headings here show where each element is discussed. Under the first heading, the first sentence states the first element's sub-conclusion, and the second sentence states its supporting rule.

**Confidential or Fiduciary Relationship**

A substantiating proof of the rule, synthesizing three holdings: *Sharp, Falise,* and *Rowe.*

Goslin's relationship with his nephew satisfies the first element. A confidential or fiduciary relation exists where one person is willing to entrust important matters to a second person. *Sharp v. Kosmalski*, 351 N.E.2d 721, 723 (N.Y. 1976); *In re Estate of Falise*, 863 N.Y.S.2d 854, 860 (App. Div. 2008). Family relations are routinely held to be confidential, including those between aunts or uncles and nieces or nephews. *See, e.g., Rowe*, 942 N.Y.S.2d at 163 (finding a confidential relation between the plaintiff and his aunt and uncle where they lived together in plaintiff's home); *Falise*, 863 N.Y.S.2d at 860 (finding a confidential relation between the decedent and his nephew where they "maintained a father and son relationship").

A counter-analysis, smoothly introduced. It would have been awkward to begin "Skeffington's lawyer might argue . . ."

Although Goslin and Skeffington had not lived together prior to the deed, as in *Rowe*, or behaved as father and son, as in *Falise*, their relationship should qualify as confidential. Goslin and his nephew have seen each other at least monthly at family get-togethers since the nephew was a boy, they attended each other's weddings, and Goslin contributed to the nephew's college tuition.

**Implied Promise by the Transferee**

The sub-conclusion for the second element.

A court will probably find a promise by the nephew to permit Goslin to continue to live in his home. All that is required is a promise, and it need not be written. The Statute of Frauds, which generally requires that contracts for land transfers be in writing, will not prevent a constructive trust. *Sharp*, 351 N.E.2d at 723-24; *Pattison v. Pattison*, 92 N.E.2d 890, 894 (N.Y. 1950); *Tebin v. Moldock*, 241 N.Y.S.2d 629, 638 (App. Div. 1963) ("Equity in this area has always reached beyond the facade of formal documents, absolute transfers, and even limiting statutes on the law side").

The supporting rule, synthesized from three cases. Because it's at least a little surprising, it needs an extended explanation and proof. Some corollary rules explain the meaning of "All that is required is a promise." (The first corollary rule tells you that the promise need not be written.)

The promise need not be express if it "may be implied or inferred from the very transaction itself." *Sharp*, 351 N.E.2d at 723. In *Sharp*, a 56-year-old farmer conveyed his farm to a 40-year-old woman who had declined his offer of marriage but lived with and accepted gifts from him. After the transfer, the woman ordered the farmer off the property. Although the record contained no evidence of an express promise, the Court of Appeals held that a promise could be inferred from the parties' behavior because it was "inconceivable that plaintiff would convey all of his interest in property which was not only his abode but the very means

of his livelihood without at least tacit consent upon the part of the defendant that she would permit him to continue to live on and operate the farm." *Id.* at 724; *see also Falise*, 863 N.Y.S.2d at 860-61 (finding a nephew's implicit promise to pay money from bank accounts titled in his name to his uncle's children); *Johnson v. Lih*, 628 N.Y.S.2d 458, 459 (App. Div. 1995) (finding a nephew's implicit promise to deed his uncle's property not only to himself but his sister too).

Like the farmer in *Sharp*, Goslin owned nothing of substance other than his home. At the time of the transfer, he had already been retired for nine years, and his only income was from Social Security. Thus, as in *Sharp*, it is inconceivable that Goslin would have transferred his property to Skeffington without the understanding that he would permit Goslin to continue to live there.

Skeffington could claim the transfer was an outright gift, but New York courts have been reluctant to accept such claims under suspect circumstances. See *Sharp,* 351 N.E.2d at 724; *Sinclair v. Purdy*, 139 N.E. 255, 258 (N.Y. 1923). In *Sinclair,* a brother, who was employed as a court clerk and continually being asked to pledge his property for other people's bail, deeded it over to his sister, receiving nothing in return. The Court of Appeals held that the circumstances implied a promise that the sister would hold her brother's share for his benefit, and Judge Cardozo wrote:

> Here was a man transferring to his sister the only property he had in the world. . . . Even if we were to accept her statement that there was no distinct promise to hold it for his benefit, the exaction of such a promise, in view of the relation, might well have seemed to be superfluous.

*Sinclair*, 139 N.E. at 258. Here, too, a distinct promise would have been superfluous given the nature of Goslin and Skeffington's relationship and Goslin's financial circumstances. Skeffington offered to pay the mortgage because Goslin could no longer afford it. Goslin has no other place to live, and the house is his only asset. It would make no sense for him to give it away without an implied promise that he could continue to live there.

Nor can Skeffington's promise to make the mortgage payments be considered payment for the title in lieu of a promise to permit Goslin to stay in his home. Skeffington offered to make the payments before Goslin deeded him the property, and if Skeffington took clear title at that time, the mortgage payments would benefit him, not Goslin. Moreover, the amount remaining on the mortgage was far below the market value of the home and would not have been adequate compensation for it.

Of all the facts here, the most troubling is that Goslin was not required to deed the home to Skeffington in order to accept his nephew's offer to pay the mortgage. Skeffington could have made the payments for Goslin without owning the home. Presumably, Goslin gave Skeffington the deed to motivate Skeffington to pay the mortgage while Goslin continued to live



Rule application begins. This element is the heart of Goslin's controversy, and the reader needs an extended explanation of why the rule will be applied this way. The rule application centers on analogies to *Sharp* and *Sinclair*. Notice how the reader is given the holding and enough of the facts to understand the comparison.

These paragraphs include counter-analyses.

there, honoring his relationship with his nephew. It seemed "the sort of thing people in a family do for each other." This is a case where equity will likely step in to accomplish "that which should have been done." *Simonds*, 380 N.E.2d at 193.

**Transfer in Reliance on the Promise**

The nephew must concede part of this element, and the rest is proved through the explanations of the first two elements.

Goslin should be able to meet the requirements of the third element. The transfer to Skeffington is not in dispute, and even though Goslin deeded the property to his nephew without his knowledge, that will not prevent the imposition of a constructive trust. See *Falise*, 863 N.Y.S.2d at 861 (imposing a constructive trust based on an uncle's transfer of title to bank accounts to his nephew without the nephew's knowledge).

**Unjust Enrichment**

The sub-conclusion for the final element.

Goslin should also be able to establish the fourth element. Unjust enrichment occurs where "property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest." *Sharp*, 351 N.E.2d at 723 (quotations omitted); *see Falise*, 863 N.Y.S.2d at 859. In *Falise*, the decedent titled two bank accounts containing roughly $500,000 in his nephew's name and, in a note opened after his death, asked his nephew to distribute the money equally among the decedent's children. In turn, the nephew claimed the money belonged solely to him. Even though the nephew had helped care for his uncle, the court held he would be unjustly enriched by keeping the money. *Falise*, 863 N.Y.S.2d at 860-62.

An analogy to *Falise*.

Similarly, Skeffington helped care for his uncle by making mortgage payments, but he would be unjustly enriched by acquiring a home worth $95,000 in exchange for $11,500 in remaining mortgage payments. A court will probably find that Skeffington has tried to convert his assumption of a family responsibility into a windfall. Skeffington's offer to pay the remaining mortgage could be seen by both parties as reciprocation for Goslin's help in putting the nephew through college, although that finding is not necessary for a ruling in Goslin's favor.

**CONCLUSION**

Goslin can likely demonstrate all the elements of a constructive trust. He had a relationship of trust and confidence with his nephew, and they have maintained a lifelong friendship. Under these circumstances, a court is likely to find that Skeffington "promised" to permit Goslin to live in the home in exchange for the deed to the property, and Goslin acted accordingly. Given Goslin's dire finances, it makes no sense to assume he gave the property to Skeffington outright. Finally, Skeffington would be unjustly enriched because he would have clear title to a $95,000 asset in exchange for $11,500 in mortgage payments. The only way to rectify this situation is to impose a trust.

# Appendix Sample Email Memo

This appendix contains an email memo of the type explained in Chapter 17.

To: Cheryl Lopez CMLopez@lmslaw.com

From: Matthew Donohoe <MDonohoe@lms.law.com>

Date: Thurs., Feb 25, 2026 at 1:44 PM

Subject: Alisha Singh/Hostile Work Environment Claim

Hi, Cheryl.

As you requested, here is the summary of my research on the Singh case so you can update the client when you meet with her tomorrow. I think that she has a viable Title VII sexual harassment claim against her employer, NRG Designs, under a hostile work environment theory.

The facts she presents satisfy the five factors established in *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990), which is still cited as the controlling case. Following is a brief summary of the factors and how Singh satisfies them:

- **The employee suffered intentional discrimination because of the employee's sex.** Sexually explicit conduct and pornographic materials in the workplace satisfy this requirement. *Koschoff v. Henderson*, 109 F.Supp.2d 332, 347 (E.D. Pa. 2000) (citing *Andrews*, 895 F.2d at 1482 n.3). The pornographic emails sent to all employees and the coworkers teasing Singh for being uptight satisfy this requirement.
- **The discrimination was pervasive and regular.** Because the conduct Singh describes occurred at regular intervals over an extended period of time, it should satisfy this factor, despite the fact that no one incident was severe. See *Spain v. Gallegos*, 26 F.3d 439 (3d Cir. 1994).
- **The discrimination detrimentally affected the plaintiff.** Singh can show that she is detrimentally affected based on her perception of the workplace as hostile and abusive. See *Spain*, 26 F.3d at 449. Her account is corroborated by her requests to be removed from the email list and complaints to an upper-level supervisor about the conduct.
- **The discrimination would detrimentally affect a reasonable person of the same sex in that position.** The ongoing nature of the harassment and the fact that it has affected her relationships with her coworkers, as reflected in her performance evaluation, should meet the requirement that a reasonable person would be detrimentally affected. In addition, Singh might be able to show that her promotion denial stemmed directly from her reaction to the emails and teasing. This would provide concrete evidence of objective harm. *Spain*, 26 F.3d at 450.
- **The existence of respondeat superior liability.** NRG is liable for the actions of Singh's supervisor as well as those of her coworkers. NRG is liable for her supervisor's actions because his conduct caused a tangible employment action (the promotion denial). See *Durham*

> *Life Ins. v. Evans*, 166 F.3d 139, 152 (3d Cir. 1999). NRG is liable for her coworkers' actions because management had been aware of the problem for 18 months and has failed to address the allegations promptly and adequately.

I have attached the key cases, and I am in the process of drafting a longer memorandum of law with supporting authority, which I will get to you by next week as we agreed, but I hope this gives you enough information for your meeting.

Take care,

Matt

Matthew Donohoe, Esq.
Lopez, Moritz and Smith LLP
MDonohoe@lms.law.com
(555) 740-4531

*This e-mail message and any attached files are confidential and are intended solely for the use of the addressee(s) named above. This communication may contain material protected by attorney-client, work product, or other privileges. If you have received this confidential communication in error, please notify the sender immediately by reply e-mail message and permanently delete the original message.*

# Appendix Sample Client Advice Letter

This appendix contains a client advice letter of the type described in Chapter 19.

The client is Ada Warren of Lincoln Notch, Vermont. She is in her late fifties. When the Lincoln Creamery fell on hard times a few years ago, she lost her job as office manager and lived thereafter on savings. When her cousin Virgil died last year, she inherited his farm near Grafton, which she sold to a Boston developer for a half-million dollars. She then booked a cruise on the Pride of Seaside, a six-cabin sailing yacht.

The degree of formality in a client letter will differ according to the client's expectations. A corporate client expects formality. An individual client might not. Contractions, for example, are appropriate in a letter to Ms. Warren. They might not, however, be appropriate in a letter from your law firm to General Electric's general counsel.

**Huber & Stanislaw**
**Attorneys at Law**
**6 Front Street**
**Seaside, ME 01203**
**(603) 555-1111**

March 22, 2026

Ada Warren
22 Green Mountain Road
Lincoln Notch, VT 05862

Dear Ms. Warren:

As I promised when we met last week, I've researched your rights against Seaside Cruises and the state Marine Police. I believe that you probably would win a lawsuit against Seaside but lose a suit against the police. In the second half of this letter, I'll explain why.

After you and I spoke last week, I examined the police logs and talked to some of the passengers. I was able to get some information (though not much) from the police officers and the captain of the Pride of Seaside. My advice later in this letter is based on my understanding of the facts, which are described in the next few paragraphs. If I've gotten any of the facts wrong, please tell me so that I can determine whether the law would treat the situation differently.

*Facts*

You boarded the Pride of Seaside at 8:30 in the evening. The boat left the dock at 9:00 PM, and you went below at about 9:30 and were asleep by about 10:15. You had felt ill earlier in the evening and had wanted to rest. At 10:40 PM, the boat was boarded by Officers Magrane and Kroyer of the State Marine Police, who suspected that a sailor had marijuana hidden behind his bunk. They found what they were looking for, arrested the sailor, and ordered the captain to sail to the Marine Police dock. There, the boat was impounded and the sailor was taken away by the police. The other passengers and the rest of the crew were awakened by the ruckus and came on deck, where they were told by Officer Kroyer that they would have to leave the boat. Officer Magrane drove the passengers (except you) in a police van to a hotel, where they slept.

Neither the crew nor the police searched the boat to make sure no one else was aboard. The police officers didn't ask for a list of passengers. The crew didn't offer a passenger list to the police or compare the passengers on deck with the boat's passenger manifest. The police say they thought it was the crew's responsibility to get everyone off the boat. The captain says that he thought the police were doing that.

You slept soundly through the night. At 12:15 AM, Officer Kroyer sealed the boat. He locked every outer door and hatch, removed the gangway, locked it in a shed, and went home. As a result, you wouldn't have been able to get to the deck because all the doors and hatches were locked from the outside, and even if you had been able to get to the deck, you wouldn't have been able to leave the boat.

No one else was at the dock until Officer Tedescu arrived at about 6:30 AM. Tedescu found a note from Kroyer that the boat had been impounded but not yet been searched, except for the sailor's bunk. He rolled out the gangway, walked on board, and at 6:45 unlocked the door to the passageway outside your cabin. You awoke at about 7:00 AM, opened your cabin door, and found Officer Tedescu standing in the passageway. Officer Tedescu explained what had happened, and you suddenly felt light-headed and fell to the floor of the passageway. In his written report, Officer Tedescu used the word "fainted" to describe this. You revived in a moment or two, and he drove you to a hospital, where an emergency room physician decided that you needed no treatment.

You were shocked at the indignity of learning that you had spent the night locked up in a police boat yard rather than cruising at sea as you thought you had been. For you, this was the same as being locked up in a jail cell overnight. Both are shameful, and would be seen as treating you like a criminal. Except for collapsing or fainting, you didn't suffer physically from these events. Seaside Cruises has refused to refund the $3,500 that you paid for this two-week cruise. They have not provided any passenger with a refund.

*Possible Lawsuits*

When we met last week, you said that you aren't sure that legal action would be worth the effort, but that you feel taken advantage of and wanted to know what your rights are. I'll explain what I think would happen if you were to sue Seaside Cruises and the Marine Police.

*Seaside Cruises:* The law considers Seaside to be a common carrier. Airlines, railroads, and bus companies are also common carriers. Common carriers owe *a very high degree of care to their passengers, including the duty to rescue a* passenger from harm. Based on the facts we have at this point, I think you would probably win on this claim. Seaside's employees should have made sure you were off the boat before it was locked up, or at least have told the police that you were aboard.

Common carriers are explained in a nontechnical way so the client will understand.

But it's harder to predict how much money a jury would award on this claim. It might be small, on the ground that you were unaware at the time that you were locked into the boat. Or it might be larger if the jury can appreciate the depth of the indignity.

On the other hand, Seaside Cruises does owe you a refund of $3,500. You paid for a service (a cruise) that Seaside did not provide. The law is clear that they aren't entitled to keep the money, even though the cruise was prevented by police seizure of their boat.

You can bring both claims against Seaside — for the refund and for failing to get you off the boat — in a single lawsuit.

*The Marine Police:* If you were to sue the state for false imprisonment, I believe that you wouldn't succeed. In this state, a false imprisonment claim can succeed only if the person confined knew of the confinement while it was occurring or was harmed by it. The law defines "harm" in this sense as economic loss or physical injury.

Here the prediction is negative.

You did suffer an economic loss (the $3,500 that Seaside has not refunded), but not because you were locked in the boat. If the police had driven you to a hotel, Seaside still would have refused to refund the money.

Because you learned of your confinement only after Officer Tedescu had unlocked the boat, your only way of succeeding in a suit against the police would be to show that the confinement caused you physical injury. The only physical injury was your collapse when Officer Tedescu told you that you had been confined, but a jury could conclude that you collapsed because you were still ill from the night before.

Moreover, in a case called *Osborne v. Floyd*, our state supreme court recently decided that the physical injury must be caused by the confinement itself. It isn't enough for the harm to be caused by knowledge of the confinement. In *Osborne*, a man was comatose and unaware he had been locked into a cellar. His medical condition didn't deteriorate before rescuers broke down the door. But after he regained consciousness and learned what had happened, he experienced nightmares. The court held that the nightmares weren't sufficient, and an injury would have to be physical for him to recover. I think the courts would treat your collapsing onto the floor the same way, especially because the emergency room physician decided that you needed no medical treatment.

The analogy can help the client accept the bad news.

I wish this weren't so, but unfortunately, it is.

A useful thing to say with bad news.

Let's talk further in a few days. If, after thinking this over, you're interested in suing Seaside Cruises, I can explain what a lawsuit would cost so you can decide whether to go ahead. It might be possible to reduce the expense of suing if other passengers join with you and sue to get the refunds they're entitled to. Please call my office when you feel ready.

Sincerely,

Gary Stanislaw

# Appendix Sample Motion Memorandum

This appendix contains a motion memorandum of the type described in Chapter 23.

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

BEATRICE RUSSELL

*Plaintiff*

v.

ELLIS CARVER

*Defendant*

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Alison Slaughter
Civil Action No. 17-007
1315 Walnut Street
Philadelphia, PA 19103
555-555-1234
*Counsel of Record for*
*Beatrice Russell*

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## INTRODUCTION

In this case, the Defendant Ellis Carver filed a debt collection claim against Ms. Beatrice Russell that he should have known, through minimal investigation, was barred by res judicata. Carver's filing of the unenforceable claim caused Ms. Russell anguish and financial harm.

By filing a claim he should have known was barred, Carver violated the Fair Debt Collection Practices Act (FDCPA). Carver is not entitled to the FDCPA's bona fide error defense because he has not demonstrated that he used reasonable procedural safeguards to prevent filing a barred lawsuit. Carver's only "procedures" amount to unreasonable reliance on information from a client he knew to be unreliable, and a single search in an error-prone, outdated online Court of Common Pleas docket. Because neither of these steps is sufficient to guard against the filing a res judicata barred lawsuit, they cannot not extinguish Carver's liability. Therefore, Carver is not entitled to summary judgment on a bona fide error defense.

## STATEMENT OF THE CASE

### A. Statement of Facts

This case arises because Ellis Carver filed an unenforceable debt collection claim against Ms. Beatrice Russell, an unemployed, disabled, single mother who has been unable to work after she was seriously injured on February 10, 2016. An uninsured driver ran a red light and hit her with his car. (Russell Dep. at 1.) Before the accident, Ms. Russell held a housekeeping position at Chestnut Hill Hospital, earning approximately $26,000 annually. (Russell Dep. at 4.) Since the accident, Ms. Russell's income has been drastically reduced to $1,000 in disability and $450 in food stamps each month. (Russell Dep. at 4:9-10.) At the time of her accident, Ms. Russell had a credit card account with Citibank and has paid minimum payments since she opened the account five years ago. (Russell Dep. at 1:15-18.) However, after the accident, Ms. Russell was unable to afford the minimum payments. (Russell Dep. at 2:9.) Ms. Russell acknowledges that she owes money to Citibank and is willing to continue making payments after she is able to return to work and can afford the payments. (Russell Dep. at 2:17.) On September 10, 2016, Citibank assigned its right under its contract with Ms. Russell to Midland Funding. (Compl. Ex. A.) Midland Funding then filed a debt collection action against Ms. Russell in the Philadelphia County Court of Common Pleas on February 6, 2017. (Compl. Ex. B.)

#### 1. First Debt Collection Action

Midland's claim sought to recover the amount of the debt plus attorneys' fees, an amount totaling $8,725.37. (Compl. at ¶7; Carver Answer at ¶7.) Midland's claim failed to include a statement of account and the cardholder agreement, which would prove that Midland owned the debt. (Compl. Ex. A.) Therefore, on or about June 20, 2017, Judge Idee Fox of the Court of Common Pleas of Philadelphia County dismissed the February complaint with prejudice because Midland failed to provide the required documents. (Compl. at ¶8; Carver Answer at ¶8.)

### 2. Carver Hired to Represent Midland in Debt Collections

Ellis Carver began his debt collection litigation practice six years ago in 2012, which became the main part of his practice in 2016. (Carver Dep. at 5:3.) He is well versed in the FDCPA provisions and the reputations of the largest debt collectors because he regularly attends the Pennsylvania Bar Institute's annual FDCPA training and is a member of Credit Collections Attorneys of America. (Carver Dep. at 4:7-8.) Carver began representing Midland in June 2017 and filed about 50 state court collection actions on its behalf. (Carver Dep. at 1:21-25.) Midland referred Ms. Russell's case to Carver in July 2017. (Carver Dep. at 1:3.)

Midland usually provides Carver with only a printout that lists the account number and amount of the debt. (Carver Dep. at 2:23.) Carver then files a complaint without attaching the statement or account or cardholder agreement, despite knowing that, at a minimum, the cardholder agreement is required. (Carver Dep. at 2:29.) As a result, Carver has on several occasions had to withdraw complaints referred to him by Midland because he was unable to obtain these documents. (Carver Dep. at 2:9-11.)

Carver testified that he was aware that Midland engages in pervasive abusive collection practices, and as a result it entered into a consent decree with the Consumer Finance Protection Bureau. (Carver Dep. at 4:23.) Despite Midland's habitual abusive collection practices, Carver nevertheless testified that he relies on Midland's referrals as proof that the cases are enforceable. (Carver Dep. at 4:1.) Carver claims to have "an agreement with Midland that all files it transmits to [him] for collection are legitimate, collectible debts with no bankruptcy discharges or any other type of problem" but provided no proof of this agreement. (Carver Dep. at 4:1-3.) Carver has not provided any written agreement with Midland, nor has he provided any additional evidence or details regarding the provisions of such an agreement. (Carver Dep. at 4.)

Moreover, Carver acknowledged in his deposition that Midland has referred to him debts that were not legitimate, collectible debts. (Carver Dep. at 3:24.) At least once, Midland referred a debt to Carver for which it had already sued the debtor. (Carver Dep. at 4:24-25.) Further, Carver admitted that Midland does not provide the documents required to collect on a debt through litigation in Pennsylvania. (Carver Dep. at 2:9-29.) Carver does not specifically ask Midland to verify it has not sued a particular debtor before because even the "Common Pleas Court docket is more reliable" than Midland. (Carver Dep. at 3:26-27.)

### 3. Carver Assigned His Secretary to Conduct a Single Search for Ms. Russell

When Midland refers a new case to Carver, he instructs his assistant, Ms. Rhonda Pearlman, to conduct a single search in a single Court of Common Pleas docket. (Carver Dep. at 2:3.) Pearlman searches only in the Court of Common Pleas in the county the debtor currently lives in, but does not search any surrounding counties or check the file to determine if the debtor has lived elsewhere. (Pearlman Dep. at 2:5-7.) Pearlman searches only for the

debtor's name, but does not perform a phonetic search of the debtor's name, which would reveal names similar to the searched name. (Pearlman Dep. at 2:23-3:2.) Further, Pearlman does not search for any cases filed by Carver's client, Midland Funding, much less for the creditor from whom Midland purchased the debt. (Pearlman Dep. at 3:9-11.)

After Midland referred Ms. Russell's case to Carver, Pearlman searched the civil docket on the Philadelphia Court of Common Pleas website for Ms. Russell's last name. (Pearlman Dep. at 2:24.) Pearlman did not identify Midland's February 2017 lawsuit naming Ms. Russell as the defendant in her single search of the Philadelphia Court of Common Pleas online docket. (Pearlman Dep. at 2:16.) The docket had "the wrong name — it says 'Brussell' not 'Russell.'" (Pearlman Dep. at 2:22.) However, if Pearlman had looked more closely, she would have seen Beatrice Russell's name correctly identified in the case parties, docket entries, and complaint filed in February 2016. (Compl. Ex. A; Compl. Ex. B.)

Carver acknowledged that there are alternatives to using the Court of Common Pleas online docket search, including fee-based online legal search resources, such as Bloomberg Law. (Carver Dep. at 4:12-13.) However, Carver does not subscribe to any of these resources. (Carver Dep. at 4:10.) Carver does not want to pay the $500 monthly subscription fee. (Carver Dep. at 4:12-13.) Carver does this despite knowing that the docket contains errors, because, as Pearlman puts it, "that's life." (Carver Dep. at 3:29; Pearlman Dep. at 3:13.)

**4. Carver Filed a Second Debt Collection Action Against Ms. Russell on the Same Debt.**

On or about July 13, 2017, Carver, representing Midland, filed a debt collection complaint against Ms. Russell. (Compl. at ¶9; Carver Answer at ¶9.) Ms. Russell was upset and confused when she was sued a second time, only months after the first suit was dismissed. (Russell Dep. at 3:8-12.) Ms. Russell explained that she "thought this was over once we won the first lawsuit. I couldn't believe I got sued again. I was worried they could just keep suing me forever." (Russell Dep. at 3:4-6.) This caused Ms. Russell so much stress and embarrassment that she suffered from insomnia, headaches, nausea and stomach pain. (Russell Dep. at 3:4; Compl. at ¶13.) Her anxiety was so severe that Ms. Russell's physician prescribed her Valium, which cost $20.00 for each prescription. (Russell Dep. at 3:19-22.)

Ms. Russell was able to obtain free counsel, but meeting with her attorney caused Ms. Russell significant hardship. Because Ms. Russell was unable to use public transportation due to her injury, her sister had to drive her to meetings, which was costly in gas and parking. (Russell Dep. at 3:16-17.)

After speaking with Ms. Russell, her attorney sent Carver a letter on September 30, 2017, setting forth the two preliminary objections filed in the Court of Common Pleas. (Carver Dep. Ex. P-1.) First, the complaint Carver filed failed to comply with Pa. R. Civ. P 1019(i). (Carver Dep. Ex. P-1.) Second, Midland Funding had already sued Ms. Russell on the same debt, and the first lawsuit was dismissed with prejudice. (Carver Dep. Ex. P-1.)

Carver waited twelve days withdraw the suit against Ms. Russell after receiving the letter from Ms. Russell's attorney. (Compl. at ¶12.) Carver only

withdrew after his secretary verified the information in the letter. (Carver Dep. at 1:15.)

### B. Procedural Background

On December 7, 2017, Ms. Beatrice Russell filed a complaint for damages under 15 U.S.C. §1692 against Mr. Ellis Carver and Midland Funding, LLC. (Compl. at ¶1.) Russell and Defendant Midland Funding entered into a Settlement Agreement on January 7, 2017, and thereafter the action against Midland Funding was dismissed. (Midland Funding Stip.) On January 2, 2018, Carver filed an answer to the complaint. (Carver Answer.) Carver filed a motion for partial summary judgment on January 12, 2018. (Carver Mot. Partial Summ. J.)

## ARGUMENT

### I. The Defendant Is Not Entitled to Summary Judgment Because Conducting a Single Search in a Lawsuit Database the Defendant Knows To Be Unreliable Is Not a Reasonable Way To Avoid a Repetitive and Abusive Lawsuit.

The purpose of the Fair Debt Collection Practices Act (FDCPA) is to "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. §1692(e) (2012). The FDCPA provides consumers with a civil cause of action when a debt collector engages abusive debt collection practices. Because the FDCPA is remedial, its language is construed "broadly, so as to effect its purpose." *Tatis v. Allied Interstate, LLC*, 882 F.3d 422, 427 (3d Cir. 2018). Accordingly, an alleged violation is evaluated from the perspective of the least sophisticated debtor to "protect the gullible as well as the shrewd." *Id.* at 427.

The FDCPA provides a narrow affirmative defense for debt collectors only "if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." §1692k(c). Thus, to establish a bona fide error defense, the Defendant must demonstrate that the error occurred despite procedures reasonably designed to avoid such an error. *Beck v. Maximus, Inc.*, 457 F.3d 291, 297-99 (3d Cir. 2006).

Here, the Defendant violated the FDCPA when he filed a lawsuit barred by res judicata. The Defendant's conduct is not protected by the bona fide error defense because the Defendant's procedures are not reasonable safeguards to prevent filing a barred lawsuit. First, the Defendant unreasonably relied on a client who was known to conduct abusive collection practices. (Carver Dep. at 3:2-3.) Second, the Defendant conducted only a single search in notoriously error-prone county court online docket. (Carver Dep. at 2-4.) These allegedly preventative procedures are cursory at best, and amount to insufficient procedural safeguards to establish a bona fide error defense.

The Defendant is not entitled to summary judgment because summary judgment is only granted when there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Because she is the non-moving party, all facts and inferences must be

viewed in the light most favorable to Russell. *Moody v. Atl. City Bd. of Educ.*, 870 F.3d 206, 213 (3d Cir. 2017). Here, the Defendant asserted an affirmative defense. The bona fide error defense is a "narrow exception to the FDCPA . . . so [the Defendant bears] the burden of proof at summary judgment." *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1177 (9th Cir. 2006). Accordingly, the Defendant must demonstrate he used reasonable procedural safeguards to prevent filing a barred lawsuit. The Defendant has not met his burden of proof; rather Russell has demonstrated that none of the Defendant's procedures were sufficiently reasonable to prevent the violation, filing a res judicata barred lawsuit.

**A. The Defendant Violated the FDCPA Because Filing a Lawsuit That He Should Have Known Was Barred by Res Judicata Is Deceptive.**

The Defendant's act of filing a res judicata barred lawsuit is deceptive under the FDCPA. Filing a barred lawsuit leads the consumer to believe that she is potentially liable when, as a matter of law, she is not. A debt collector is deceptive when it falsely represents "the character, amount, or legal status of any debt." §1692e(2)(A). It is well settled that filing a barred lawsuit is deceptive. *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 33 (3d Cir. 2011) (letter seeking payment on time barred debt).

A debt collector may only seek repayment on a time-barred debt so long as it "does not initiate or threaten legal action in connection with its debt collection efforts" from the perspective of the least sophisticated debtor. *Id*. at 32-33. Filing a time-barred lawsuit implicitly misrepresents the status of the debt and therefore deceives the debtor as to the legal status of the debt. *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1489 (M.D. Ala. 1987) (filing a lawsuit on a time-barred debt). Accordingly, filing a barred lawsuit is deceptive. Here, similar to *Huertas* and *Kimber*, the Defendant's lawsuit represented to an unsophisticated debtor that he could recover in the lawsuit when, as a matter of law, he could not. Accordingly, the complaint filed by the Defendant was deceptive.

Moreover, "a debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." §1692f. Filing a time-barred lawsuit is "unjust and unfair, and in violation of public policy" because "even if the consumer realizes that she can use time as a defense, she will more than likely still give in rather than fight the lawsuit." *Kimber,* 668 F. Supp. at 1447-48. The Defendant's act of filing a res judicata barred lawsuit was unfair means because Ms. Russell is an unsophisticated consumer who, like the debtor in *Kimber*, is likely unaware that the defense of res judicata is available to her.

**B. The Defendant's Filing of a Deceptive Claim Cannot Be Excused by Good Faith Because His Information About the Claim Came From a Source That He Knew Was Unreliable.**

The Defendant's reliance on Midland was unreasonable and therefore is insufficient to establish a bona fide error defense. A debt collector is not shielded from liability under the bona fide error defense when it unreasonably relies on a creditor's representation, even though the FDCPA does not require

a debt collector to independently verify each debt. *Clark*, 460 F.3d at 1176 (9th Cir. 2006). Unreasonable reliance also extends to attorney-debt collectors who file barred lawsuits. *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 949 (9th Cir. 2011). Here, the Defendant unreasonably relied on Midland because he knew Midland was unreliable. (Carver Dep. at 3:27.)

*1. The Defendant Provided No Proof of Any Agreement With Midland That It Would Not Refer Uncollectable Claims to Him.*

The mere fact that the Defendant alleges that there was an agreement with Midland that it would not refer debts with problems is insufficient to establish a bona fide error defense because he has not provided any evidence of such an agreement. A debt collector must provide evidence that its reliance on a creditor is reasonable to discharge its liability through the bona fide error defense. *Bacelli v. MFP, Inc*., 729 F. Supp. 2d 1328, 1336 (M.D. Fla. 2010) (finding MFP was not entitled to the bona fide error defense where it asserted that it relied on its client to provide bankruptcy information but did not present any evidence of an agreement with the creditor). *Id*. at 1336.

Further, an alleged agreement is insufficient to establish a bona fide error defense when it is not based on a written agreement or oral understanding. *Turner v. J.V.D.B. & Assoc., Inc.*, 318 F. Supp. 2d 681 (N.D. Ill. 2004). JVDB sent Turner a collection letter on a debt discharged in bankruptcy, but asserted that it relied on its client to provide bankruptcy information. *Id*. at 684. However, this was "merely an unfounded assumption," as JVBD never even affirmatively asked the creditor whether the debt was valid, much less had a contractual obligation for the creditor to inform it of debts discharged in bankruptcy. *Id*. at 686. Thus, JVDB was not entitled to the bona fide error defense.

Here, unlike *Heintz* and *Transworld*, the Defendant has not provided any proof of any agreement other than his self-serving testimony and has provided no details about the alleged agreement with Midland or what duties it required Midland to perform. Because the existence and parameters of the alleged agreement are so murky, this case is similar to *Turner* and *Bacelli*, where the debt collector failed in his bona fide error defenses. Because a reasonable jury could conclude on these facts that the Defendant's reliance on Midland was unreasonable, the Defendant is not entitled to summary judgment on a bona fide error defense.

Only in those rare cases where there is an "elaborate and significant" procedure to avoid filing invalid claims can a debt collector establish a bona fide error defense. *Hyman v. Tate*, 362 F.3d 965, 697 (7th Cir. 2004) (evidence at bench trial showed agreement with creditor not to refer stale debts was reasonable). For example, a debt collector is entitled to the bona fide error defense when it requires its client to verify the debt under oath. *Jenkins v. Heintz*, 124 F.3d 824, 834 (7th Cir. 1997). In *Jenkins*, the debt collector filed a debt collection lawsuit which included fees that were not authorized by the debtor's agreement with the creditor. *Id*. at 826. However, the debt collector required its client to "verify under oath that each of the charges was true and correct," which was an elaborate and significant procedure to prevent collecting unauthorized charges. *Id*. at 834. Thus, the debt collector's reliance on

its client was reasonable and it was entitled to the bona fide error defense. *Id.* at 835-36. Because the Defendant's approach does not come close to the procedures followed by the debt collector in *Jenkins*, *Jenkins* does not apply here.

*2. The Defendant Pursued Midland's Claim Against Russell Despite Knowing That Midland Had Previously Sent Him Uncollectable Claims.*

The Defendant's reliance on Midland to refer only valid debts to him, when he knew that Midland often sent him unenforceable debt claims, undercuts his bona fide error defense. Even reliance on a trustworthy creditor does not "establish that reliance in the present case was reasonable" and cannot replace procedures to prevent mistakes. *Reichert v. Nat'l Credit Sys., Inc.*, 531 F.3d 1002, 1006 (9th Cir. 2008). And in this case, Midland was far from a reliable source and the Defendant knew it. When a debt collector has reason to know that the creditor is unreliable, reliance on the creditor is unreasonable. *See Clark*, 460 F.3d at 1177.

In *Clark*, the debt collector relied on the creditor's report of the debt, although it was aware of the creditor's billing and booking inconsistencies. *Id.* at 1176. The Court denied the debt collector's motion for summary judgment because the debt collector's reliance on the creditor's representation of the debt was unreasonable given the creditor's history. *Id.* at 1177.

Similarly, when a debt collector relies on the creditor, giving it the benefit of the doubt in the face of conflicting evidence, its reliance is unreasonable. *McCollough*, 637 F.3d at 949. In *McCollough*, software flagged the debtor's case as possibly being past the statute of limitations, but the creditor told the debt collector that the statute of limitations had been extended. *Id.* at 945. The Court held that the debt collector's reliance on the creditor was unreasonable, and it was not entitled to the bona fide error defense because the information was inconsistent and the creditor expressly did not warrant the accuracy of its information. *Id.* at 949.

Here, the Defendant acknowledged that Midland is unreliable. (Carver Dep. at 3:26-27.) Similar to *Clark*, where the debt collector knew of the creditor's billing and bookkeeping inconsistencies, the Defendant knew that Midland was unreliable and that it "entered into a consent decree with the Consumer Finance Protection Bureau because of its abusive collection practices." (Carver Dep. at 4:23.) The decree describes that Midland engages in "scattershot litigation," filing hundreds of thousands of lawsuits and discouraging its attorneys from requesting documentation. *Id.* at 13. Thus, the Defendant knew, or should have known, that Midland engages in abusive debt collection practices and regularly does not provide its attorneys with the information required to properly pursue a debt through litigation. Therefore, a jury could find the Defendant's reliance on Midland was unreasonable.

Indeed, there is evidence in the record that Midland referred the Defendant a res judicata-barred debt once before. The Defendant has offered no evidence to counter this. (Carver Dep. at 4:24-25.) Taken in the light most favorable to Russell, a reasonable jury could conclude that Russell's case was not the first res judicata barred case Midland referred to the Defendant, making the

Defendant's reliance on Midland far more unreasonable than the reliance in any of the precedent.

Even if the Defendant had evidence that Russell's case predated the other res judicata barred case Midland referred to the Defendant, he is still not entitled to the bona fide error defense. First of all, there is ample other evidence of Midland's unreliability. Moreover, as established by *Reichert*, the Defendant is not entitled to wait until Midland makes a mistake before it begins to institute procedures to prevent filing a res judicata barred lawsuit. *Reichert*, 531 F.3d at 1007. Rather, the Defendant has an "affirmative obligation" to institute procedures to prevent errors. Under *Reichert*, he cannot simply rely on Midland, even if they had always provided reliable information.

### C. Performing a Single Search in a Database the Defendant Knew To Be Unreliable Cannot Satisfy the Defendant's Statutory Obligation to Avoid Filing Baseless Claims.

The Defendant's procedure of performing a single search in the Philadelphia Court of Common Pleas docket was not reasonable because it allows only limited searches in an error-prone docket. This made the Defendant susceptible to the error of filing a res judicata barred lawsuit, which is, in fact, what happened here. A debt collector has an "affirmative statutory obligation to maintain procedures reasonably adapted to avoid readily discoverable errors." *Owen*, 629 F.3d at 1277. Here, the Defendant acknowledges that the Common Pleas docket contains errors, and that alternatives were available, but he failed to use these alternatives. (Carver Dep. at 4:10-13.) This does not meet his burden at summary judgment.

#### *1. The Defendant's Search Resulted in the Exact Error for Which the Database Was Known.*

The Defendant's procedure of performing only a single search in an error-prone database is not reasonable because his method of searching is susceptible to the type of error that occurred. When a debt collector chooses to rely on a specific software to prevent an error, it "is obligated to use that software in an effective manner." *Regan v. Law Offices of Edwin A. Abrahamsen & Assocs., P.C.*, No. 08-5923, 2009 WL 4396299, at *10 (E.D. Pa. Dec. 1, 2009). In *Regan*, the debt collector relied on computer software to alert it of debtors who are represented by counsel so that it did not violate the FDCPA by contacting the debtor directly. *Id.* at *8. However, the debt collector used the software by deleting and reentering diary codes, rather than using the adverse attorney feature, which prevents automated letters from being sent to the debtor. *Id.* at *9. Thus, the debt collector's method of using the software was "susceptib[le] to the kind of error that occurred" because if the diary code is inadvertently deleted, it would not alert the debt collector as intended. *Id.* at *9. Thus, the debt collector was not entitled to summary judgment on the bona fide error defense. *Id.* at *10.

Here, the Defendant acknowledges that the docket he relied upon is error prone. (Carver Dep. at 3:29.) However, the Defendant did nothing to fulfill his "affirmative statutory requirement" to alleviate the potential for "readily

discoverable" errors. He did not search for his client's name, Midland, in the docket system. (Pearlman Dep. at 3:9-11.) He did not employ the use of the Philadelphia Common Pleas docket's option to use a phonetic search or search for similar names to the debtor. (Pearlman Dep. at 2:23-3:2.) Thus, similar to *Regan*, the Defendant relied on computer software to prevent violating the FDCPA, but failed to use features that would have prevented the error at issue.

*2. The Defendant Failed to Perform a Docket Search in Compliance With Common Industry Standards.*

The Defendant's search within a single error-prone online court docket is unreasonable in light of alternative databases that are reasonably adapted to find previously filed lawsuits. These databases are widely used in the legal industry. Although the FDCPA does not require that a debt collector use state-of-the-art methodologies, it does require a debt collector to use reasonable methodologies. *Ross v. RJM Acquisitions Funding LLC*, 480 F.3d 493, 497-98 (7th Cir. 2007).

In *Ross*, the court held that the debt collector did not have to use complex searches or algorithms because the FDCPA's reasonableness requirement does not require the debt collector to use "state-of-the-art" technology. In *Ross*, the debt collector sent a dunning letter to the debtor regarding a debt that had been discharged in bankruptcy. *Id.* at 496. The debt collector had hired an outside firm to perform a computerized search of bankruptcies to confirm that debts it sought to collect had not been discharged. *Id*. at 497. However, the debtor had incorrectly listed her name as Delisa Ross, rather than Lisa Ross, the name under which she accrued debt. Therefore, the search for Lisa Ross did not reveal Ross' bankruptcy. *Id*. at 497. *Ross* opined that using complex searches and algorithms, which would have identified Lisa Ross as Delisa Ross, were unnecessary. *Id*. at 497-98.

Docket searching databases, such as Bloomberg Law, are not state-of-the-art, but rather are widely used in the legal industry. A 2006 survey showed 82.9% of all attorneys use a fee-based online legal research resource. 4 Am. Bar Ass'n, Legal Technology Resource Center Survey Report: Online Research 59 (2006). Even in small firms with 2-9 attorneys, such as the Defendant's firm, 89% of attorneys use a fee-based online legal research resource. *Id*. at 59. Accordingly, a fee-based online legal research resource, such as Bloomberg, is not state-of-the-art when, even 12 years ago, more than 80% of all attorneys used these resources.

Fee-based online legal research resources allow users to perform comprehensive docket searches which would have identified Ms. Russell's first lawsuit. Bloomberg's docket search allows a user to include multiple criteria within a single search. Bloomberg Law, Dockets Search, bloomberglaw.com, https://www.bloomberglaw.com/page/law_school#advanced-search/dockets (last accessed February 23, 2018). For example, users can search within one or more courts and search for multiple parties, combinations of parties and the role of each party. *Id*. Users can also search for keywords both within the docket itself and documents within the documents filed in a case. *Id*. Here, a fee-based online legal research resource such as Bloomberg likely would

have identified Ms. Russell's previous lawsuit because Midland was correctly identified in the caption, and Ms. Russell was correctly identified in the case parties, docket entries, and complaint filed in February 2016. (Pearlman Dep. at 2:22; Compl. Ex. A; Compl. Ex. B.)

The single search performed by the Defendant is significantly inferior to the debt collector's much more thorough search in *Ross*. Unlike the debt collector in *Ross*, the Defendant did not hire a professional service specifically adapted to identify accounts that have been discharged through bankruptcy using multiple variables. In contrast, the Defendant likely spent no more than 15 minutes on his single search. Further, the search conducted by the Defendant, unlike the one in *Ross*, allows the searcher to search only for a single party in a search or by docket number, which would require a searcher to already know that a suit had been filed. Accordingly, the search conducted by the Defendant is significantly inferior to that in *Ross*, and the holding in *Ross* should not control here.

The cost of using a fee-based search tool is not so excessive that it is disproportionate to the potential harms done. *Ross* estimated that obtaining a credit report on each debtor would cost $1.5 million per year and therefore it would be unreasonable to require a debt collector to do so given the "relative . . . harm caused by the dunning letters mailed in error." *Ross*, 480 F.3d at 497. In sharp contrast, access to a search tool would cost the Defendant $500 per month ($6,000 per year). (Carver Dep. at 4:12-13.) This is less than 0.5% of the cost of credit checks estimated by *Ross*. Further, the harm in filing a second lawsuit against Russell was very high. She was so upset that she had to go see a physician who prescribed her Valium. (Russell Dep. at 3:19-20.) Further, Russell had to pay $20 for each prescription, and the incurred the cost of gas and parking, to meet with attorneys. (Russell Dep. at 3:16-22.) While this may seem insignificant to most, these additional costs placed a serious financial burden on Russell, whose only income is $1,000 in disability and $450 in food stamps. (Russell Dep. at 4:9-10.) Accordingly, a jury could find that the cost of using Bloomberg, or another fee-based search tool, would have been reasonable given its low cost and ability to prevent significant harm caused by the error of filing a res judicata barred lawsuit.

## CONCLUSION

For the all the foregoing reasons, Beatrice Russell respectfully requests that this Honorable Court not award partial summary judgment to Ellis Carver.

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# Appendix Excerpts from Appellant's Fourth Circuit Brief in *G.G. v. Gloucester County School Bd.* (2016)

This appendix includes excerpts from the Appellant's brief. Appendix H includes excerpts from the appellee's brief in the same case.

The appellant is a young transgender man. At the time of the lawsuit, he was a high school student. The Gloucester County School Board had forbidden him to use the boys' restroom in his school. In the litigation documents, he was identified by his initials for privacy reasons.

G.G. argued that the School Board had discriminated against him in violation of Title IX of the Education Amendments of 1972 as well as the Equal Protection Clause in the Fourteenth Amendment to the U.S. Constitution. In the District Court he moved for a preliminary injunction that would require his high school to allow him to use the boys' restroom. The District Court denied the motion and dismissed his Title IX claim.[1]

G.G. appealed to the Fourth Circuit. This appendix includes excerpts from his brief there as the appellant. The Fourth Circuit reversed,[2] but the Supreme Court vacated that decision in 2017 and remanded "for further consideration

1. *G.G. ex rel. Grimm v. Gloucester County School Bd.,* 132 F. Supp. 3d 736 (E.D. Va. 2015).
2. *G.G. ex rel. Grimm v. Gloucester County School Bd.*, 822 F.3d 709 (4th Cir. 2016).

in light of" changes in policy by the U.S. Department of Education and Department of Justice.[3]

In June 2020, the Supreme Court held, in *Bostock v. Clayton County*, that firing an employee "for being gay or transgender" violates Title VII of the Civil Rights Act of 1964.[4] Two months later, the Fourth Circuit ruled again that the School Board had violated Title IX of the Education Amendments of 1972 and the Constitution's Equal Protection Clause when it discriminated against G.G., who by then had passed his 18th birthday and was known in litigation by his full name — Gavin Grimm. The Fourth Circuit said this on the Title IX issue:

> After the Supreme Court's recent decision in *Bostock v. Clayton County*, . . . we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him "on the basis of sex." Although *Bostock* interprets Title VII of the Civil Rights Act of 1964, . . . it guides our evaluation of claims under Title IX. See . . . *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) ("Congress modeled Title IX after Title VI . . . and passed Title IX with the explicit understanding that it would be interpreted as Title VI was . . .).[5]

The briefs in this appendix and in Appendix H are governed by Rules 28(a) and 28(b) of the Federal Rules of Appellate Procedure:

> **Rule 28. Briefs**
>
> (a) **Appellant's Brief.** The appellant's brief must contain, under appropriate headings and in the order indicated:
>
> (1) a disclosure statement if required by Rule 26.1;
>
> (2) a table of contents . . . ;
>
> (3) a table of authorities . . . ;
>
> (4) a jurisdictional statement . . . ;
>
> (5) a statement of the issues presented for review;
>
> (6) a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record . . . ;
>
> (7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

3. *Gloucester County Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017).
4. 140 S. Ct. 1731, 1754 (2020).
5. *Grimm v. Gloucester Cty. Sch. Bd.*, 2020 WL 5034430, 2020 U.S. App. LEXIS 27234 (4th Cir. 2020).

(8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(9) a short conclusion stating the precise relief sought; and

(10) the certificate of compliance, if required by Rule 32(g)(1).

(b) **Appellee's Brief.** The appellee's brief must conform to the requirements of Rule 28(a)(1)-(8) and (10), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case; and

(4) the statement of the standard of review.

To make these appendices more helpful to students, the briefs have been edited to reduce their size. Among other things, the appellant's jurisdictional statement and both parties' corporate disclosures have been omitted. Also omitted are certificates of compliance and service, the appellant's request for oral argument, and issues concerning the District Court's exclusion of various evidence, the appellant's request for reassignment to another District Court judge, and deference to administrative agencies' interpretation of their own regulations under *Auer v. Robbins*, 519 U.S. 452 (1997). To adjust for these omissions, some point headings are renumbered in the appendices, and some subheadings are relettered. To streamline the briefs for students, the Statements of the Case, Summary of Argument, and Argument have been shortened. In addition, the following are omitted: footnotes, citations not necessary to the argument, and some attorney details. A few typographical and grammatical incongruities have been resolved, and citations have been conformed to the Bluebook, sometimes by substituting a complete cite for a short-form one. In a very few instances, a word, such as the conjunction "and," has been inserted as a consequence of a deletion. To preserve readability, deletions have not been marked with ellipses or brackets.

No. 15-2056

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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**G.G.**, by his next friend and mother, **DEIRDRE GRIMM**

*Plaintiff-Appellant,*

v.

**GLOUCESTER COUNTY SCHOOL BOARD**

*Defendant-Appellee.*

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On Appeal from the United States District Court
for the Eastern District of Virginia
Newport News Division

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**BRIEF OF PLAINTIFF-APPELLANT**

---

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Notice that the two briefs don't tackle the Title IX and Equal Protection arguments in the same sequence. The School Board's brief in App. H addresses Equal Protection first and then Title IX.

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## INTRODUCTION

This is a preliminary statement as described in Ch. 29 (§29.1). Here it's called an Introduction. It tells the court in a nutshell what the appeal is all about. While doing that, lawyers also introduce the court to their theory of the appeal (Ch. 24).

Plaintiff G.G. is a 16-year-old transgender boy who has just begun his junior year at Gloucester High School. He is a boy and lives accordingly in all aspects of his life, but the sex assigned to him at birth was female. In accordance with the standards of care for treating Gender Dysphoria, he is undergoing hormone therapy; he has legally changed his name; and his state identification card identifies him as male. In every other context outside school, he uses the boys' restrooms, just like any other boy would.

During his sophomore year, with the permission of school administrators, G. used the boys' restrooms at school for seven weeks without incident. After some parents complained, however, the Gloucester County School Board (the "Board") passed a new policy that singles out transgender students for different treatment than all other students. The policy prohibits G. from using the same restrooms as other boys and relegates him to single-stall, unisex restrooms that no other student is required to use.

G. alleges that the Board's policy of excluding transgender students from the restrooms used by all other students violates his rights under Title IX and the Fourteenth Amendment by stigmatizing transgender students, depriving them of physical access to school resources, jeopardizing their health, and impairing their ability to participate equally in the educational benefits and opportunities of school. G. seeks a preliminary injunction to stop the ongoing irreparable harm he experiences each day he is subject to the Board's policy.

## STATEMENT OF ISSUES

See the exercise at the end of Ch. 31 (Questions Presented).

1. Should G. be granted a preliminary injunction to allow him to resume using the boys' restrooms during the pendency of the case?

2. Should the court's dismissal of the Title IX claim be reversed?

## STATEMENT OF CASE

### *Gender Dysphoria*

This brief explains the story in much detail. Partly that's to help the court grasp medical and other facts that aren't widely understood, and partly it's to give the court a feeling for how the plaintiff has experienced the situation. A judge's work isn't limited to logical reasoning. It includes empathy, which is why motivating arguments are essential.

"Gender identity" is a well-established medical concept, referring to one's sense of oneself as belonging to a particular gender. J.A. 36. All human beings have a gender identity. *Id*. It is an innate and immutable aspect of personality that is firmly established by age four, although individuals vary in the age at which they come to understand and express their gender identity. *Id*. Typically, people who are designated female at birth based on their external anatomy identify as girls or women, and people who are designated male at birth identify as boys or men. *Id*. For transgender individuals, however, the sense of one's self — one's gender identity — differs from the sex assigned to them at birth. *Id*.

The medical diagnosis for that feeling of incongruence is Gender Dysphoria, a serious medical condition codified in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V) (American Psychiatric Association 2013) and *International Classification of Diseases-10* (World

Health Organization 2010). The criteria for diagnosing Gender Dysphoria are set forth in the DSM-V (302.85). J.A 37. Untreated Gender Dysphoria can result in significant clinical distress, debilitating depression, and suicidal thoughts and acts. *Id.* The World Professional Association for Transgender Health has established international *Standards of Care for treating people with Gender Dysphoria* (the "WPATH Standards"). J.A. 37. Leading medical and mental health organizations, including the American Medical Association, the Endocrine Society, and the American Psychological Association, have endorsed the WPATH Standards as the authoritative standards of care. *Id.*

Under the WPATH Standards, treatment for Gender Dysphoria is designed to help transgender individuals live congruently with their gender identity and eliminate clinically significant distress. J.A. 38. Attempting to change a person's gender identity to match the person's sex assigned at birth is ineffective and harmful to the patient. *Id.* "It is important to note that gender nonconformity is not in itself a mental disorder. The critical element of gender dysphoria is the presence of clinically significant distress associated with the condition." Am. Psychiatric Ass'n, *Gender Dysphoria Fact Sheet* 1 (2013).

Under the WPATH Standards, social role transition — living one's life fully in accordance with one's gender identity — is a critical component of treatment for Gender Dysphoria. J.A. 38. For a transgender male, that typically includes dressing and grooming as a male, adopting a male name, and presenting oneself to the community as a boy or man. *Id.* The social transition takes place at home, at work or school, and in the broader community. *Id.* If any aspect of social role transition is impeded, it undermines a person's entire transition. *Id.* Negating a person's gender identity poses serious health risks, including depression, post-traumatic stress disorder, hypertension, and self-harm. J.A. 40.

Motivating arguments are usually introduced in a Statement of the Case, where they are *implied by the way the story is told rather than expressly stated.* They should be expressly stated in the Argument. In Ch. 26, see §§26.3.1 and 26.3.2.

***G.'s Gender Dysphoria***

At a very young age, G. was aware that he did not feel like a girl. J.A. 28. By approximately age twelve, G. acknowledged his male gender identity to himself and to close friends. J.A. 29. By ninth grade, most of G.'s friends knew his gender identity, and they treated him as male when socializing away from home and school. *Id.*

G.'s untreated Gender Dysphoria, and the stress of concealing his gender identity from his family, caused him to experience severe depression and anxiety. *Id.* G.'s mental distress was so severe that he could not attend school in 2014 during the spring semester of his freshman year. *Id.* Instead, he took classes through a home-bound program that follows the public high school curriculum. *Id.*

In April 2014, G. told his parents that he is transgender. *Id.* At his request, he began seeing a psychologist with experience working with transgender youth. *Id.* G.'s psychologist diagnosed G. with Gender Dysphoria and, consistent with the WPATH Standards, recommended that he begin living in accordance with his male gender identity in all aspects of his life. *Id.* G.'s psychologist also provided G. with a "Treatment Documentation Letter" confirming he was receiving treatment for Gender Dysphoria and, as part of that

treatment, should be treated as a boy in all respects, including with respect to his use of the restroom. *Id.* G. uses the boys' restrooms in public venues such as restaurants, libraries, and shopping centers. J.A. 30.

In July 2014, G. successfully petitioned the Circuit Court of Gloucester County to change his legal name to G. J.A. 29. G. now uses that name for all purposes, and his friends and family refer to him using male pronouns. *Id.*

Also consistent with the WPATH Standards, G.'s psychologist recommended that he see an endocrinologist to begin hormone treatment. *Id.* G. has received hormone treatment since late December 2014. J.A. 30. Among other therapeutic benefits, the hormone treatment has deepened G.'s voice, increased his growth of facial hair, and given him a more masculine appearance. *Id.*

In June 2015, the Virginia Department of Motor Vehicles approved G.'s request for the sex designation "M" for male to appear on his driver's license or identification card. J.A. 60.

***School Response***

In August 2014, before beginning his sophomore year, G. and his mother informed officials at Gloucester High School that G. is a transgender boy and that he had legally changed his name to G. J.A. 30. G. and his mother also met with the school principal and guidance counselor to explain that G. is a transgender boy and that, consistent with his medically supervised treatment, he would be attending school as a male student. *Id.*

G. initially agreed to use a separate restroom in the nurse's office because he was unsure how other students would react to his transition. *Id.* When the 2014-15 school year began, however, G. was pleased to discover that his teachers and the vast majority of his peers respected the fact that he is a boy and treated him accordingly. J.A. 30-31. G. found the separate restroom stigmatizing and inconvenient, so he asked the principal permission to use the boys' restrooms. J.A. 31. On or about October 20, 2014, the principal agreed that G. could use the boys' restrooms. *Id.* For approximately the next seven weeks, G. used the boys' restrooms without incident. *Id.*

Nevertheless, some adults in the community were angered when they learned that a transgender boy was attending the school and using the boys' restroom. J.A. 57-58. Those adults contacted members of the Board to demand that the transgender student be barred from using the boys' restrooms. *Id.*

Shortly before the Board's meeting on November 11, 2014, Board member Hooks added the following policy for discussion on the agenda:

> Whereas the GCPS recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and

students with gender identity issues shall be provided an alternative appropriate private facility.

Gloucester County School Board Minutes, Nov. 11, 2014 ("Nov. 11 Minutes") at 4.

G. and his parents attended the meeting to speak against the policy. J.A. 31. Doing so required G. to identify himself to the entire community, including local press covering the meeting, as the student whose restroom use was at issue. *Id*. "All I want to do is be a normal child and use the restroom in peace," G. said. *See* Gloucester County School Board Video Tr., Nov. 11, 2014 ("Nov. 11 Video Tr."). "I did not ask to be this way, and it's one of the most difficult things anyone can face." *Id*. 26:14. "This could be your child . . . . I'm just a human. I'm just a boy." *Id*. 27:02.

Most speakers at the meeting urged the Board to prohibit G. from using the restrooms that other boys use. *See* Nov. 11 Minutes at 3. Speakers voiced many stereotypes and misperceptions about transgender people and expressed fears that equal treatment for transgender students would lead to dire consequences. Some speakers pointedly referred to G. as a "young lady" to negate his gender identity. Nov. 11 Video Tr. 14:55; 18:07; 20:36; 1:06:48. One speaker claimed that permitting transgender students to use the same restrooms as others would lead to teenage pregnancies and sexually transmitted infections. *Id*. 34:40. Another cited the Bible and complained about "morality creep." *Id*. 53:35. And another said G.'s use of the boys' restrooms would lead to boys wearing dresses to school and demanding to use the girls' restroom for improper purposes. *Id*. 20:55.

The Board deferred voting on the policy until its meeting on December 9, 2014. *See* Nov. 11 Minutes at 4.

At the Board's December 9, 2014, meeting, most speakers again opposed permitting transgender students to use the same restrooms as other students. *See* Gloucester County School Board Minutes, Dec. 9, 2014 ("Dec. 9 Minutes") at 3. Several speakers threatened to vote Board members out of office if they did not require transgender students to use separate restrooms. Gloucester County School Board Video Tr., Dec. 9, 2014, ("Dec. 9 Video Tr.") 42:34; 50:53; 59:34; 1:17:56. Some speakers said allowing transgender boys to use the boys' restroom would make the restrooms "coed." *Id*. 39:23; 41:11. Speakers again referred to G. as a "girl" or "young lady." *Id*. 38:00; 1:17:40. One speaker who described herself as a "former lesbian" said "we have forgotten than God created a man and a woman" and complained that prayers have been removed from schools. *Id*. 1:19:48. Another called G. a "freak" and compared him to a person who thinks he is a dog and wants to urinate on fire hydrants. *Id*. 1:22:55; 1:23:19.

The Board voted 6-1 to pass the policy prohibiting transgender students from using the same restrooms as other students. Dec. 9 Minutes at 4.

***Aftermath***

The public, community-wide debate about which restrooms he should use has been humiliating for G., who feels that he has been turned into "a public spectacle" in front of the entire community "like a walking freak show." J.A. 31.

The day after the Board adopted the new policy, the principal told G. he could no longer use the same restrooms as other boys. J.A. 32. G. must now use separate, private facilities instead of using the same restrooms as other students. The Board has asserted that G. may use the girls' restroom, but that is not a realistic possibility for G. or other boys who are transgender. Even before G. transitioned, other students objected to his presence in the girls' restroom because they perceived him to be a boy. *Id*.

G. refuses to use the separate, single-stall restrooms because they are even more stigmatizing and isolating than the restroom in the nurse's office. *Id*. No other students actually use these restrooms, and only one of the restrooms is located anywhere near the restrooms used by everybody else. *Id*. Adding to the stigma, everyone knows the restrooms were installed specifically for G. so that other boys would not have to share the same restroom with him. *Id*. The separate restrooms physically and symbolically mark G. as "other," isolate G. from the rest of his peers, and brand him as unfit to share the same restrooms as other students. *Id*. Every time G. has to use the restrooms at school, other students are visibly reminded that the school considers him to be different than other students, making him feel alienated and humiliated. J.A. 32-33.

To escape such stigma and humiliation, G. tries to avoid using the restroom entirely while at school, and, if that is not possible, he uses the nurse's restroom. J.A. 32. Using the nurse's restroom still makes him feel embarrassed and humiliated, which increases his dysphoria, anxiety, and distress. J.A. 32-33. G. feels embarrassed that everyone who sees him enter the nurse's office knows he is there because he has been prohibited from using the same boys' restrooms that the other boys use. J.A. 33. To avoid using the restroom, G. limits the amount of liquids he drinks and tries to "hold it" when he needs to urinate during the school day. J.A. 32-33. As a result, G. has repeatedly developed painful urinary tract infections and has felt distracted and uncomfortable in class. *Id*.

Dr. Randi Ettner — a psychologist and nationally recognized expert in the treatment of Gender Dysphoria in children and adolescents — recently conducted an independent clinical assessment of G. and concluded that "excluding G.G. from the communal restroom used by other boys and effectively banishing him to separate single-stall restroom facilities is currently causing emotional distress to an extremely vulnerable youth and placing G. at risk for accruing lifelong psychological harm." J.A. 41. Dr. Ettner determined that G. has Gender Dysphoria and that medically necessary treatment for G. includes testosterone therapy and social transition in all aspects of his life — including the use of the boys' restrooms. J.A. 42.

By this point, are you able to see things through G.G.'s eyes — how he has experienced all these events?

Dr. Ettner explained that ages 15-16 are particularly vulnerable years for teenagers, when nothing is more important than fitting in with one's peers. J.A. 39-40. That vulnerability is even greater for transgender teenagers who, because of Gender Dysphoria, already feel different and must take additional steps to fit in with their peers. J.A. 40. As a result of those challenges, transgender students are at far greater risk for severe health consequences — including suicide — than other students, and more than 50 percent of transgender youth will have attempted suicide at least once by age 20. *Id*. Stigma also causes many transgender youth to experience academic difficulties and to drop out of school. J.A. 41. Transgender students' stress and victimization at school are associated with a greater risk for

post-traumatic stress disorder, depression, life dissatisfaction, anxiety, and suicidality in adulthood. *Id*.

Dr. Ettner concluded that the stigma G. experiences every time he needs to use the restroom "is a devastating blow to G. and places him at extreme risk for immediate and long-term psychological harm." J.A. 42.

### *Procedural History*

G. originally filed the Complaint and Motion for Preliminary Injunction on June 11, 2015, the day after the end of the 2014-15 school year, with the goal of obtaining a preliminary injunction before September 10, 2015, the first day of the 2015-16 school year. J.A. 25.

On September 4, 2015 — a few days before school began — the court denied G.'s Motion for Preliminary Injunction. J.A. 137.

The wrap-up in a Statement of the Case takes the reader to the procedural event — the lower court's ruling — that has been appealed.

## SUMMARY OF ARGUMENT

This case is not about whether schools may provide separate restrooms for male and female students. It is about how to provide transgender students with equal, non-discriminatory access to those existing restrooms, as Title IX and the Fourteenth Amendment require. A preliminary injunction is necessary to stop the ongoing irreparable harm the Board has inflicted on G. by preventing him from using the same restrooms as other students and relegating him to separate, single-stall facilities.

G. has established a likelihood of success on his Title IX claim. Title IX's prohibition on discrimination "on the basis of sex" protects transgender students from discrimination based on their transgender status or gender nonconformity. Discrimination against transgender people is necessarily discrimination based on sex because it is impossible to treat people differently based on their transgender status without taking their sex into account. Requiring transgender students to use separate restrooms from other students violates Title IX by stigmatizing transgender students, depriving them of physical access to school resources, jeopardizing their health, and impairing their ability to participate equally in the educational benefits and opportunities of school.

G. has also established a likelihood of success on his Equal Protection claim. For the same reasons that excluding G. from using the same restrooms as other students violates Title IX, it also discriminates based on gender and requires heightened scrutiny under the Fourteenth Amendment. The Board has not carried its burden under heightened scrutiny to show that forcing G. to use separate restrooms substantially advances an interest in privacy or any other important governmental interest.

Because G. is likely to prevail on the merits, the remaining preliminary injunction factors necessarily weigh in his favor.

As you read the Summary of Argument and the Argument itself below, identify every place where the brief makes a policy argument.

## ARGUMENT

### I. Preliminary Injunction Standard.

See Ch. 29, §29.3 (standards of review).

This Court "evaluate[s] the court's decision to deny a preliminary injunction for an abuse of discretion, reviewing the court's factual findings for clear error and its legal conclusions de novo. A court abuses its discretion when it misapprehends or misapplies the applicable law." *League of Women Voters v. North Carolina*, 769 F.3d 224, 235 (4th Cir. 2014) (internal quotation marks omitted; alterations incorporated).

This is the four-element test G.G. must satisfy. See Ch. 27 (procedural postures). The brief is organized around these elements. Because G.G. must satisfy all of them, the Argument includes several paradigmed proofs. For how to organize in this situation, see Ch. 13 (combining separate paradigm proofs).

To obtain a preliminary injunction, "[p]laintiffs must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest." *Id*. at 236. "While plaintiffs seeking preliminary injunctions must demonstrate that they are likely to succeed on the merits, they need not show a certainty of success." *Id*. at 247 (internal quotation marks omitted).

### II. G. Has Established a Likelihood of Success on His Title IX Claim.

#### *A. Excluding Transgender Students from Using the Same Restrooms as Other Students Discriminates Against G. on the Basis of Sex.*

In persuasive writing, the paradigm is modified to emphasize motivating arguments. See §§26.3.1 and 26.3.2 in Ch. 26.

G. is a boy and lives accordingly in all aspects of his life. He is undergoing hormone therapy; he has legally changed his name; and his state identification card identifies him as male. In every other context outside school, he uses the boys' restrooms, just like any other boy would. At school, however, the Board has singled him out for different treatment than everyone else. Most non-transgender boys would feel humiliated if they were publicly labeled as different and forced to use a separate restroom from all the other boys. G. feels that way too.

This paragraph identifies a gap in the law and lays a foundation for filling the gap in later paragraphs. In Ch. 7, see §7.5 on gap-filling.

By singling out G. for different and unequal treatment because he is transgender, the Board has discriminated against him based on sex, in violation of Title IX. This Court has not addressed whether discrimination against transgender individuals constitutes discrimination based on sex. *See Lewis v. High Point Reg'l Health Sys.*, 79 F. Supp. 3d 588, 589 (E.D.N.C. 2015). Within this Circuit, however, two district courts have already held that discrimination against transgender people is sex discrimination, *see id*. at 589-90; *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014), and another two have issued rulings where the defendant conceded that Title VII applied, *see Muir v. Applied Integrated Tech., Inc.*, No. 13-0808, 2013 WL 6200178, at *10 (D. Md. Nov. 26, 2013); *Hart v. Lew*, 973 F. Supp. 2d 561, 581 (D. Md. 2013).

Discrimination based on transgender status is discrimination based on sex under Title IX and other federal civil rights statutes because an individual's "transgender status is necessarily part of his 'sex' or 'gender' identity." *Rumble v. Fairview Health Servs.*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415,

at *2 (D. Minn. Mar. 16, 2015). By definition, transgender individuals are people whose gender identity is not congruent with the sex assigned to them at birth. Accordingly, when an official "discriminates against someone because the person is transgender," the official necessarily "has engaged in disparate treatment related to the sex of the victim." *Mia Macy*, EEOC DOC 0120120821, 2012 WL 1435995, at *7 (Apr. 20, 2012) (internal quotation marks omitted). Just as it is impossible to discriminate against a person for being a religious convert without discriminating based on religion, it is impossible to treat people differently based on their transgender status without treating them differently based on sex.

In addition, discrimination based on a person's transgender status also inherently involves impermissible discrimination based on a person's gender nonconformity. Under Title IX and other federal civil rights statutes, discrimination "on the basis of sex" includes discrimination for "failing to act and appear according to expectations defined by gender." *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011). For example, in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court ruled that an employer discriminated on the basis of "sex" when it denied promotion to an employee based, in part, on her failure to conform to stereotypes about how women should behave. The employee was advised that if she wanted to advance in her career she should be less "macho" and learn to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id*. at 235. *Price Waterhouse* thus "eviscerated" the reasoning of some lower court decisions that attempted to narrow Title VII by drawing a distinction between discrimination based on sex and discrimination based on gendered behavior. *Smith*, 378 F.3d at 573.

Under *Price Waterhouse*, it does not matter whether a plaintiff is perceived "to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender nonconforming transsexual." *Schroer v. Billington,* 577 F. Supp. 2d 293, 305 (D.D.C. 2008). Transgender individuals are people who do not conform to the general assumption that a person's gender identity will correspond to the sex assigned to that person at birth. Thus, "it would seem that any discrimination against transsexuals (as transsexuals) — individuals who, by definition, do not conform to gender stereotypes — is . . . discrimination on the basis of sex as interpreted by *Price Waterhouse*." *Finkle*, 12 F. Supp. 3d at 788; *see Rumble*, 2015 WL 1197415, at *2 ("Because the term 'transgender' describes people whose gender expression differs from their assigned sex at birth, discrimination based on an individual's transgender status constitutes discrimination based on gender stereotyping."). There is inherently "a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms." *Glenn*, 663 F.3d at 1316.

The *Price Waterhouse* line of cases confirms what is already evident from the text of Title IX. "[I]ntentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex." *Macy*, 2012 WL 1435995, at *11 (internal quotation marks omitted; alterations incorporated). By treating G. differently than every other boy because of the sex assigned to him at birth, the Board is treating him differently based on "sex" under Title IX.



In statutes prohibiting sex discrimination, what did Congress mean by the word "sex"? This is a classic statutory interpretation problem, like the *McBoyle* case in Ch. 8 (working with statutes). Both this brief and the one in App. H use some of the statutory interpretation tools explained in Ch. 8.

Both briefs discuss *Glenn v. Brumby* and *Price Waterhouse v. Hopkins*. Use the App. H brief's Table of Authorities to find that brief's discussion of these two cases. How do the two briefs differ in the way they handle them?

On the Title IX issue, the rule proof part of the paradigm (Ch. 11) was mostly in subpoint A above. Rule application starts here in subpoint B.

### *B. Excluding G. from Using the Same Restrooms as Other Students Deprives Him of Equal Access to Educational Opportunity.*

At the most basic level, Title IX protects students from "physical deprivation of access to school resources" based on gender. *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). The Board has physically deprived G. and other transgender students of equal access to school resources by excluding them from the same restrooms used by everyone else. *See Lusardi v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756, at *8 (Apr. 1, 2015) (excluding transgender woman from restrooms used by other women deprived her of a basic term and condition of employment); *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. CIV.02-1531PHX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004) ("[N]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait. Application of this rule may not be avoided merely because restroom availability is the benefit at issue."); *cf. Snyder ex rel. R.P. v. Frankfort-Elberta Area Sch. Dist.*, No. 1:05-CV-824, 2006 WL 3613673, at *1 (W.D. Mich. Dec. 11, 2006) (requiring black elementary school student to use separate restroom in response to harassment from other students deprived her of "equal access to restroom facilities" in violation of the Equal Education Opportunity Act).

Singling out G. for different treatment than all the other boys also interferes with his medically necessary treatment for Gender Dysphoria. As Dr. Ettner explained, when authority figures deny transgender students access to the restroom consistent with their gender identity, they shame those students — negating the legitimacy of their identity and posing health risks, including depression, post-traumatic stress disorder, and self-harm. J.A. 41. The harm caused to transgender students' physical and psychological well-being necessarily interferes with their ability to thrive at school. For example, the depression and anxiety G. previously experienced as a result of concealing his gender identity at school and from his parents was so great that G. could not attend school during the spring of his freshman year. J.A. 29.

Excluding G. from the same restrooms used by all other students further denies G. equal educational opportunity by publicly shaming him and physically isolating him from the rest of his peers. The policy is an official school decree marking G. and other transgender students as unequal based on other students' supposed disapproval or discomfort with them. It sends a message to G. and the entire school community that G. is not a "real" boy and should not be treated as such. The intention and effect of the transgender policy were crystallized in the words of one of its supporters: "[W]e have a thousand students versus one freak." Dec. 9 Video Tr. 1:22:53.

This stigma has real consequences for G. and other transgender students. Transgender students are at far greater risk for severe health consequences — including suicide — than the rest of the student population, and more than 50 percent of transgender youth will have had at least one suicide attempt by age 20. J.A. 40. The stress and victimization transgender students experience at school is associated with a greater risk for post-traumatic stress disorder, depression, anxiety, and suicidality in adulthood. J.A. 41.

### III. G. Has Established a Likelihood of Success on His Equal Protection Claim.

Likelihood of success on the merits is the first element of the preliminary injunction test.

For the same reasons that excluding G. from using the same restrooms as other students discriminates based on sex under Title IX, it also triggers heightened scrutiny under the Equal Protection Clause. *Glenn*, 663 F.3d at 1318-19. "[A]ll gender-based classifications today warrant heightened scrutiny." *United States v. Virginia,* 518 U.S. 515, 555 (1996) (internal quotation marks omitted). Heightened scrutiny applies even when discrimination is based on physical or anatomical differences. *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 60 (2001). And it applies whether the asserted justification for discrimination is benign or invidious. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). The "analysis and level of scrutiny applied to determine the validity of the classification do not vary simply because the objective appears acceptable." *Id*. at 724 n.9.

G.G. pleaded two claims. Point II addressed his Title IX claim. Here Point III addresses his Equal Protection claim. If the court believes that he is likely to succeed in proving either claim in the trial court, he has satisfied the first element.

The Board cannot carry its burden of proof under this heightened-scrutiny standard. Just six days before adopting the new policy excluding transgender students from the same restrooms as their peers, the Board identified alternatives to protect the privacy of all students, such as "adding or expanding partitions between urinals in male restrooms," "adding privacy strips to the doors of stalls in all restrooms," and "[d]esignat[ing] single-stall, unisex restrooms." Dec. 3 Press Release 2. Such gender-neutral alternatives demonstrate that excluding transgender students from the same restrooms used by everyone else is not substantially related to the asserted interest in privacy. *See Wengler v. Druggists Mut. Ins. Co.,* 446 U.S. 142, 151 (1980) (invalidating sex-based classification where sex-neutral approach would serve the needs of both classes); *Orr v. Orr*, 440 U.S. 268, 281 (1979) (same).

Despite these additional privacy measures, the district court stated that excluding transgender students from the same restrooms as other students would vindicate non-transgender students' constitutional right to bodily privacy. J.A. 160-62. In support, the court cited precedent regarding prisoner's privacy rights related to the involuntary exposure of genitals to members of the opposite sex. *Id*. Excluding G. from the boys' restroom, however, has no relationship to preventing exposure to nudity — especially in light of the additional privacy measures the Board has already implemented. According to the court, even with no exposure to nudity, the Board's privacy concerns also encompass students' purported objections to "[t]he mere presence" of a transgender person "in the restroom." J.A. 162. But such concerns, even if sincerely held, have nothing to do with the constitutional right to bodily privacy invoked by the court.

While privacy interests may justify separate but truly equal and non-stigmatizing restroom facilities for boys and girls, they cannot justify policies that stigmatize one group of students as inherently unfit to use the same restrooms as everyone else. Some students may (or may not) be uncomfortable with "[t]he mere presence" of a transgender person "in the restroom." J.A. 162. But discomfort with transgender people is not a legitimate basis for imposing unequal or stigmatizing treatment.

Ultimately, if other students are not comfortable using a restroom with a transgender person present, they have the option — like any other student — to use one of the new single-stall unisex facilities the Board has

installed. But the Board cannot place the burden on transgender students to use separate restroom facilities to address other students' discomfort with their "mere presence."

Point IV addresses the other elements of the preliminary injunction test.

## IV. G. Has Satisfied the Remaining Preliminary Injunction Factors.

### *A. An Injunction Is Necessary to Prevent Irreparable Harm to G.*

Subpoint A argues that G.G. has satisfied the second element (threatened with irreparable harm).

Because G. is likely to succeed on the merits, he has also established irreparable harm. "[T]he deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks omitted). The violation of G.'s rights under Title IX also constitutes irreparable harm that cannot be compensated by monetary damages.

In this case, moreover, G. faces irreparable harm with serious medical consequences. The expert declaration by Dr. Ettner was more than sufficient to corroborate G.'s testimony about the psychological distress he experiences as a result of being singled out for different treatment than every other boy at Gloucester High School and forced to use separate single-stall restroom facilities. Excluding G. from the same restrooms as other students increases G.'s risk of depression, anxiety, and self-harm. J.A. 33, 40. It impairs his ability to perform well academically. J.A. 33, 41. It subjects him to physical pain associated with avoiding the restroom. J.A. 32-33. And, at a time of life when fitting in with peers is all-important, it publicly labels him as different from every other student in his school. J.A. 39-40. These harms are irreparable.

### *B. The Balance of Hardships Weighs in Favor of an Injunction.*

Subpoint B argues that G.G. has satisfied the third element (balance of hardships favors an injunction).

The balance of hardships weighs strongly in favor of a preliminary injunction. As explained earlier, allowing G. to resume using the boys' restrooms will not affect privacy interests related to nudity. Any student with privacy concerns based on G.'s "mere presence" in the restroom has the option of using the new single-stall restrooms instead. J.A. 162. The Board cannot credibly argue that using separate single-stall restrooms would be too burdensome for other students but is not a hardship for G.

The court distorted its analysis of the balance of harms by drawing a false equivalence between the burden imposed on G. from being relegated to using a separate restroom and the burden that would be imposed on students who choose to use a separate restroom in order to avoid the "mere presence" of G. The court stated, "It does not occur to G. that other students may experience feelings of exclusion when they can no longer use the restrooms they were accustomed to using because they feel that G.'s presence in the male restroom violates their privacy." J.A. 162. There is simply no equivalence on this record between the burden placed on a student who chooses to use a separate restroom in order to avoid G. and the stigma and isolation caused

by singling out G. and forcing him to use separate restrooms that no other student is required to use.

### *C. An Injunction Is in the Public Interest.*

Subpoint C argues that G.G. has satisfied the last element (public interest).

An injunction in favor of G. is in the public interest. It is always in the public interest to "uphold[] constitutional rights." *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013) (en banc) (internal quotation marks omitted). Similarly, the "public interest is certainly served by promoting compliance with Title IX." *Doe*, 888 F. Supp. 2d at 778; *accord Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir. 1993) ("[T]he overriding public interest l[ies] in the firm enforcement of Title IX.").

## CONCLUSION

For the foregoing reasons, the denial of Plaintiff's motion for preliminary injunction should be reversed, and the dismissal of the Title IX claim should be reversed.

Respectfully submitted,

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Dated: October 21, 2015

# Appendix Excerpts from Appellee's Fourth Circuit Brief in *G.G. v. Gloucester County School Bd.* (2016)

This appendix includes excerpts from the appellee's brief. Excerpts from the appellant's brief are in Appendix G.

The introductory note at the beginning of Appendix G explains the lawsuit, the appeal, Rule 28 of the Federal Rules of Appellate Procedure, and the material that is omitted or edited in these Appendices.

No. 15-2056

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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**G.G.**, by his next friend and mother, **DEIRDRE GRIMM**
*Plaintiff-Appellant,*

v.

**GLOUCESTER COUNTY SCHOOL BOARD**
*Defendant-Appellee.*

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On Appeal from the United States District Court
for the Eastern District of Virginia
Newport News Division

---

**BRIEF OF DEFENDANT-APPELLEE**

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Notice that the two briefs don't tackle the Equal Protection and Title IX arguments in the same sequence. G.G.'s brief in App. G addresses Title IX first and then Equal Protection.

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## INTRODUCTION

This is a preliminary statement as described in Ch. 29 (§29.1). In this court, it's called an Introduction. It tells the court in a nutshell what the appeal is all about. While doing that, lawyers also introduce the court to their theory of the appeal (Ch. 24).

The fundamental issue in this appeal is whether the Fourteenth Amendment or Title IX require the Gloucester County School Board to permit a student, who was born and remains anatomically a female, to use the boys' restroom, because the student now identifies as a boy. Appellant ("G.G.") was born a girl and is biologically a female. G.G. has female anatomy. G.G. enrolled in Gloucester High School as a girl and started ninth grade as a girl. At the beginning of G.G.'s sophomore year, school officials were informed that G.G. was transgender and now identified as a boy. G.G., however, is still biologically and anatomically a female. There is no allegation, medical evidence, or medical testimony that G.G. is a boy or has male chromosomes.

The restrooms and locker rooms in Gloucester County schools are separated based on the students' biological sex. The school has boys' restroom and locker room facilities and girls' restroom and locker room facilities. After informing the school that G.G. identified as a boy, G.G. voluntarily chose not to use the boys' restroom. G.G. instead used a separate restroom in the nurse's office. In late October of 2014, G.G. asked to use the boys' restroom. On October 20, 2014, school personnel at the high school allowed G.G. to use the boys' restroom.

Taking the safety and privacy of all students into consideration, the School Board on December 9, 2014, adopted a restroom and locker room resolution. In implementing this resolution ("policy"), the School Board maintained the practice of providing separate restrooms and locker rooms based on students' biological and anatomical sex. The School Board also provided three unisex, single-stall restrooms for any student, including G.G., to use for greater privacy. G.G., however, refuses to use either the girls' restrooms or the single-stall restrooms.

## STATEMENT OF ISSUES

See the exercise at the end of Ch. 31 (Questions Presented).

1. Whether the Fourteenth Amendment or Title IX requires the School Board to permit G.G., who was born and remains anatomically a female, to use the boys' restroom because G.G. identifies as a boy.

2. Should this Court affirm the District Court's denial of G.G.'s Motion for Preliminary Injunction?

## STATEMENT OF THE CASE

The Statement of the Case is shorter in this brief than in the appellant's brief in App. G. That's because the School Board's story is less complex than G.G.'s story. As you read this Statement of the Case, list the most important facts

G.G. is a 16 year old high school student in Gloucester County, Virginia. J.A, 9, ¶1, J.A, 11, ¶9. G.G. is biologically a female. G.G. was born a girl and has female genitalia. J.A, 28, J.A, 33, ¶31. G.G. enrolled in high school as a girl. J.A, 29; J.A, 12, ¶20; J.A, 57. At the beginning of G.G.'s sophomore year, school officials were informed that G.G. was transgender and identified as a boy. G.G., however, is still biologically and anatomically a female. J.A, 33; J.A, 38-39.

When school officials were informed that G.G. was transgender, school officials immediately expressed support. J.A, 9, ¶2; J.A, 14, ¶28. School officials agreed to refer to G.G. using his new name and by using male pronouns. J.A, 14, ¶28. School officials changed G.G.'s name in the school records. At G.G.'s request, school officials have permitted G.G. to continue with the home-bound program for the school's physical education requirements. J.A, 14, ¶29.

After informing the school that G.G. identified as a boy, G.G. voluntarily chose not to use the boys' restroom and instead used a separate restroom in the nurse's office. J.A, 9-10, ¶3; J.A, 15, ¶30. In October of 2014, G.G. asked to use the boys' restroom. School personnel at the high school complied with that request on October 20, 2014.

After receiving numerous complaints from parents and students, the School Board on November 11, 2014, considered the difficult issues associated with a transgender student seeking to use the restroom that does not correspond with the student's anatomical sex. J.A, 57-58. During the discussion, several citizens expressed concerns to the School Board. J.A, 15-17, ¶¶34-38. The School Board also considered G.G.'s concerns. J.A, 16-17, ¶38; J.A, 31, ¶21.

Taking the safety and privacy of all students into consideration, on December 9, 2014, the School Board adopted a restroom and locker room resolution that provided:

> Whereas the GCPS recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

J.A, 18, ¶43.

In implementing the resolution, the School Board maintained its existing practice of providing separate restrooms and locker rooms based on a student's biological sex. The School Board also provided three unisex, single-stall restrooms for any student to use. J.A, 17, ¶41; J.A, 19, ¶47; J.A, 57-58. Under the policy, G.G. is not permitted to use the boys' restrooms. J.A, 18, ¶45. Based on G.G.'s biological sex, G.G. is permitted to use the girls' restroom. G.G. chooses not to do so. J.A, 18-19, ¶46; J.A, 57-58. G.G. is permitted to use the unisex, single-stall restrooms, but also refuses to use those restrooms. J.A, 19, ¶48; J.A, 58.

G.G. filed a Complaint and Motion for Preliminary Injunction against the School Board on June 11, 2015, alleging that the School Board's policy violates the Equal Protection Clause of the Fourteenth Amendment and Title IX.

From the bench, the Court granted the School Board's Motion to Dismiss G.G.'s Title IX claim in Count II of the Complaint. J.A, 116.



from the School Board's point of view. As you read the rest of the brief, look for places where those facts are woven into legal arguments.

The wrap-up in a Statement of the Case takes the reader to the procedural event — the lower court's ruling — that has been appealed.

**SUMMARY OF ARGUMENT**

The School Board's policy of separating students in restroom and locker room use based on the students' biological and anatomical sex does not violate the Equal Protection Clause or Title IX. Moreover, by providing three single-stall restrooms for any student to use, G.G. is being treated the same as all students at Gloucester High School. Transgender status is not a suspect classification under the Equal Protection Clause, and G.G. does not ask this Court to recognize it as a suspect classification. In fact, G.G. is not asking that transgender status alone be treated as a separate classification. Transgender status is also not a class protected by Title IX.

As you read the Summary of Argument and the Argument itself below, identify every place where the brief makes a policy argument.

G.G.'s attempt to state a cause of action under the Equal Protection Clause and Title IX by construing the phrase "based on sex" to include gender identity is not persuasive. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) does not support G.G.'s assertion that by virtue of transgender status alone, the School Board's policy violates the Equal Protection Clause and Title IX. The School Board's policy is not grounded in the false assertion that G.G. does not conform to the stereotypes, behaviors or mannerisms expected of G.G.'s biological sex or gender identity. Instead, it is grounded in the biological and anatomical differences between boys and girls.

No court has held that a transgender student has the constitutional right, or the right under Title IX, to use a restroom that is inconsistent with that student's biological sex in a school setting. In fact, the only United States District Court to have considered the issue held that a University did not violate the Equal Protection Clause or Title IX by maintaining a policy of sex segregated bathrooms and locker rooms or by requiring the transgender plaintiff to use the bathroom and locker room that correlated with his biological sex. *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015). The same result is dictated here.

**ARGUMENT**

**I. Standard of Review on Appeal.**

See Ch. 29, §29.3 (standards of review).

The denial of a preliminary injunction is an immediately appealable interlocutory order. 28 U.S.C. §92(a)(1). This Court evaluates a district court's decision to deny a preliminary injunction under an abuse of discretion standard. *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 366 (4th Cir. 2012). Pursuant to this standard, the Court reviews the District Court's factual findings for clear error and reviews its legal conclusions de novo. *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013). Because preliminary injunctions are "extraordinary remed[ies] involving the exercise of very far-reaching power," this Court should be particularly "exacting" in its use of the abuse of discretion standard when it reviews an order granting or denying a preliminary injunction. *Pashby*, 709 F.3d at 319.

Compare this with the standard of review discussion in G.G.'s brief in App. G. As the plaintiff below and the appellant on appeal, G.G. must satisfy these procedural tests. The School Board's brief stresses the barriers G.G. must overcome.

A preliminary injunction is "an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied 'only in [the] limited circumstances' which clearly demand it." *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1992) (quoting *Instant Air Freight Co. v. C.F.*

*Air Freight, Inc.*, 882 F.2d 797, 800 (3d Cir. 1989)). It is "never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). Instead, a preliminary injunction is a "drastic remedy not to be granted unless the movant clearly establishes the burden of persuasion as to the four requisites." *American Civil Liberties Union of Florida, Inc. v. Miami-Dade County School Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009) (citations omitted).

In deciding whether to grant a preliminary injunction, G.G. must demonstrate that (1) G.G. is likely to succeed on the merits, (2) G.G. is likely to suffer irreparable harm, (3) the balance of hardships tips in G.G.'s favor, and (4) the injunction is in the public interest. *Winter*, 555 U.S. at 20. A preliminary injunction must be denied if G.G. does not satisfy every factor of this test. *Pashby*, 709 F.3d at 320-21.

The brief is organized around the four-element preliminary injunction test. See Ch. 27 (procedural postures). The School Board argues that G.G. can't satisfy these elements.

## II. G.G. is not likely to succeed on the merits, because the School Board has not violated the Equal Protection Clause.

The District Court did not abuse its discretion in denying G.G. a preliminary injunction, because G.G. is not likely to succeed on the merits of the Complaint. The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. The equal protection requirement "does not take from the States all power of classification," *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 271 (1979), but "keeps governmental decision makers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

Because more than one element is involved, this brief's Argument includes several paradigmed proofs. For how to organize in this situation, see Ch. 13 (combining separate paradigm proofs).

Thus, "[t]he [Equal Protection] Clause requires that similarly-situated individuals be treated alike." *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008). In order to make out a claim under the Equal Protection Clause, a plaintiff must demonstrate (1) that he has been treated differently from others similarly situated and (2) that the unequal treatment was the result of intentional discrimination. *Morrison v. Garraghty*, 239 F.3d 648, 652 (4th Cir. 2001). G.G. was not denied equal protection of the law on the basis of sex.

### *A. All students are treated the same.*

The School Board's policy does not discriminate against any class of students. Instead, the policy was developed to treat all students and situations the same. To respect the safety and privacy of all students, the School Board has had a long-standing practice of limiting the use of restroom and locker room facilities to the corresponding biological sex of the students. The School Board also provides three single-stall bathrooms for any student to use regardless of his or her biological sex. Under the School Board's restroom policy, G.G. is being treated like every other student in the Gloucester Schools. All students have two choices. Every student can use a restroom associated with their anatomical sex, whether they are boys or girls. If students choose not to use the restroom associated with their anatomical sex, the students can use a private, single-stall restroom. No student is permitted to use the restroom of the opposite sex. As a result, all students, including

Notice how this brief and G.G.'s brief, in App. G, interpret the same facts very differently.

female to male transgender and male to female transgender students, are treated the same.

### *B. There is no evidence of intentional discrimination.*

G.G. cannot demonstrate, under the allegations in the Complaint or in the evidence presented on the Motion for Preliminary Injunction, that there was intentional discrimination. The School Board did not develop the restroom and locker room policy in an attempt to stigmatize, embarrass or otherwise reject G.G. Indeed, when school officials were informed that G.G. was transgender, school officials immediately expressed support. J.A, 9, ¶2, J.A, 14, ¶28. School officials changed G.G.'s name in the official school records, refer to G.G. using his new name, and refer to G.G. using male pronouns. J.A, 14, ¶27. G.G. has not alleged that school officials have in any way harassed or discriminated against G.G. in his educational opportunities or engaged in any form of discriminatory treatment with respect to G.G.'s transgender identification. *Nofsinger v. Virginia Commonwealth Univ.*, 523 F. App'x 204, 206 (4th Cir. 2013) (failed to establish that any differential treatment was the result of discrimination.)

### *C. G.G.'s transgender status does not create a suspect class or evidence of discrimination under the Equal Protection Clause.*

The United States Supreme Court and this Court have not recognized transgender status as a suspect classification under the Equal Protection Clause. In fact, no Circuit Court has recognized transgender status, alone, as a suspect classification under the Equal Protection Clause. To the contrary, Courts have rejected the notion that transgender status, or other classifications of sex, is a suspect classification. *See, e.g.*, *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1222 (10th Cir. 2007) (holding that transsexuals are not a protected class under Title VII); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (Title VII does not afford a cause of action for discrimination based upon sexual orientation); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals").

G.G. asserts on brief that G.G. is a boy. (Appellant Br., p. 20). The Complaint and evidence on the preliminary injunction, however, establish that G.G. was born a girl and remains anatomically and biologically a girl. G.G. has female genitalia. G.G. enrolled in high school as a girl. G.G. has been diagnosed with Gender Dysphoria by a psychologist, and now identifies as a boy. The Complaint does not allege, however, that G.G. is a boy anatomically. Medical evidence was not introduced at the preliminary injunction hearing to establish that G.G. is a boy. Accordingly, the Complaint and evidence show that G.G. is biologically and anatomically a girl.

This point is not made to be insensitive to G.G.'s diagnosis of Gender Dysphoria. Instead, it is made to show that G.G. is not being treated differently from any other similarly situated students. The School Board's policy provides at its most basic level that if a student is anatomically a female, the

student can use the girls' restrooms or a single-stall restroom, but the student cannot use a restroom designated for anatomical males. The reverse is true with anatomical males. Accordingly, because G.G. does not seek to create a new classification for transgender status, the Equal Protection claim cannot survive under the facts of this Complaint.

Ignoring this underlying flaw in the case, G.G. attempts to redefine the meaning of sex. G.G. contends that "sex" does not mean biologically male or female. Instead, G.G. tries to obtain protected status under the Equal Protection Clause by arguing that sex encompasses gender "nonconformity." Appellant Br., p. 38. This argument implicitly attempts to create a classification based on transgender status, despite G.G.'s steadfast refusal to assert this very claim. This position is evident in G.G.'s assertion that "discrimination based on a person's transgender status also inherently involves impermissible discrimination based on the person's gender nonconformity." (Appellant Br., pp. 22-23). That assertion misinterprets *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), is not supported by the cases cited by G.G., and would create a new sex classification not currently protected under the Constitution.

*Price Waterhouse* holds that discrimination based on behavior that is inconsistent with a sex stereotype is prohibited. A policy based on anatomy, however, is not "sex stereotyping" under *Price Waterhouse*. In *Price Waterhouse*, the Supreme Court considered a Title VII claim based on allegations that a female employee at Price Waterhouse was denied partnership, because she was considered "macho" and "overcompensated for being a woman." 490 U.S. at 235. The female employee had been advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id*. The Court found that such comments were indicative of gender stereotyping, which Title VII prohibited as sex discrimination. Accordingly, the Court found that "an employer who acts on the basis of a belief that a woman cannot be aggressive or that she must not be" has acted on the basis of sex. *Id*. at 251.

The use of *Price Waterhouse* and subsequent employment cases to support a transgender stereotype theory in the school restroom context is not analogous. In the employment context, as in *Price Waterhouse*, employees allege that they are discriminated against because the employer believes the employee is not behaving in accordance with the employee's biological sex. Nevertheless, G.G. suggests that the federal cases he cites stand for the proposition that transgender status alone can support a discrimination claim based on gender non-conformity. See, *e.g.*, Appellant Br., pp. 22-23. Contrary to that suggestion, those cases do not stand for the proposition that transgender status supports an Equal Protection Claim.

For example, in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), the plaintiff was a male and intended to take steps to transition to a female, including wearing women's clothing to work. The plaintiff's supervisor told the plaintiff that his appearance was not "appropriate." The supervisor found the plaintiff's appearance "unnatural" and "unsettling." *Id*. The court in *Glenn* concluded that the transgender plaintiff's discrimination claim arose from the failure to act according to socially prescribed gender roles. That is, the plaintiff's claim could proceed because of evidence of sex stereotyping — acts "which presume that men and women's appearance and behavior will be determined by *their*

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Both briefs discuss *Price Waterhouse v. Hopkins* and *Glenn v. Brumby*. Use the App. G brief's Table of Authorities to find that brief's discussion of these two cases. How do the two briefs differ in the way they handle them?

*sex . . .*" *Id*. at 1317, 1320 (emphasis added) ("All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype."). Thus, the plaintiff was seeking protection on the basis of his biological sex — male.

Similarly, *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), is a classic sex stereotyping case where the Sixth Circuit concluded that the plaintiff had stated a cause of action by alleging that the defendant's discrimination was motivated by his appearance and mannerisms, and the defendant's belief that this behavior was "inappropriate for his perceived sex." The same is true with *Barnes v. City of Cincinnati*, 401 F.3d 729, 738 (6th Cir. 2005), where the plaintiff was a male to female transsexual. The plaintiff alleged discrimination based upon his mannerisms and the way he behaved. There, supervisors told the plaintiff he was not sufficiently masculine, and numerous supervisors and peers criticized him for lacking a quality known as command presence." Thus, the sexual stereotyping claim was again grounded in plaintiff's biological sex. *Id. See also Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000) (reasonable to infer from the Complaint that the plaintiff was told to go home and change because the supervisor thought that the plaintiff's attire did not accord with his male gender.) In sum, sex stereotyping cases are all grounded in allegations that the transgender plaintiffs were discriminated against because their behaviors, mannerisms or appearance did not correspond to notions attributable to their biological sex.

Here, G.G.'s behavior, mannerisms and appearance are not at issue. In fact, G.G. does not seek constitutional protection based on biological and anatomical sex. Instead, G.G. asks the Court to provide protection based on gender identity. Yet the Complaint and evidence show that while G.G. now identifies as a boy, G.G. was born biologically and anatomically female, enrolled in school as a female, and remains biologically and anatomically female. The Complaint and evidence submitted during the hearing on the motion for a preliminary injunction do not show that the School Board acted on an impermissible stereotype associated with G.G. being a girl or, for that matter, a boy.

The School Board acted based on the admitted and legitimate biological and anatomical differences between boys and girls. Accordingly, it is apparent that G.G. is seeking protection based on transgender status alone, not stereotypes about biological sex, and there has been no unlawful discrimination under the Equal Protection Clause based on G.G.'s sex. The District Court's Order denying the Motion for Preliminary Injunction should be affirmed.

### *D. There is a substantial interest for the restroom policy.*

Even if G.G. could assert an Equal Protection claim, the School Board's policy does not violate the Equal Protection Clause. Only one United States District Court has considered whether a public school can prohibit a transgender student from using a bathroom or locker room that is not associated with that student's biological sex.

In *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015), the plaintiff was born a biological female. The plaintiff entered college as a female, but later identified as a male. The plaintiff was diagnosed with Gender

Identity Disorder, legally changed his name, and began living as a male. The plaintiff used the men's restrooms and locker rooms on campus. The plaintiff, however, remained anatomically a female.

Thereafter, the plaintiff was told that he could not use the men's restrooms or locker rooms. When the plaintiff refused to comply with this policy, he was expelled from the University. The plaintiff filed suit against the University alleging that the school's policy violated the Equal Protection Clause of the Fourteenth Amendment and Title IX. In short, *Johnston* is nearly "on all fours" with this case, except that it arose in a university instead of a high school setting, and the plaintiff in *Johnston* was expelled whereas G.G. is simply offered an alternative restroom. The District Court, in a detailed analysis and opinion, rejected these claims.

*Johnston* held that transgender status is not a suspect classification, and that providing separate restroom and locker room facilities for college students based on their biological sex did not violate the Equal Protection Clause. As the Court noted, this holding is consistent with the holdings of numerous other courts that have considered allegations of discrimination by transgender individuals, whether under the Fourteenth Amendment or Title VII. *See Frontiero v. Richardson*, 411 U.S. 677 (1973); *Etsitty v. Utah Transit Auth.*, 502 F.3d at 1221-22; *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982).

The same result should be reached here. Not only is the School Board's policy rationally related to protecting students' safety and privacy rights, but it is substantially related to this important governmental interest. G.G. frames the question as "whether an important interest in privacy is substantially furthered by the new policy regulating the restroom use of transgender students." (Appellant Br., p. 39). That ignores, however, the underlying basis for the policy's existence.

The policy was implemented to ensure that the safety and privacy rights of all students, both boys and girls, are respected and protected. In doing so, the School Board focused on those privacy rights by providing three single-stall restrooms that any student can use for increased privacy. Thus, contrary to G.G.'s suggestion, the question is whether the School Board's policy of providing separate bathrooms based on anatomical sex, along with providing single-stall restrooms for all students, serves the governmental interest in protecting all students' safety and privacy.

The answer is yes. This case is not an employment case involving adults. It is a case that involves the public education of children, kindergarten through twelfth grade. In fact, the School Board's interests here are much more compelling than in *Johnston*, because the School Board is responsible for the care and education of minor children, from kindergarten through twelfth grade, not adults in college as in *Johnston*. There is no question that the School Board has a substantial interest in protecting the safety and privacy of minor children while they are in school.

As *Johnston* noted, the issue presents "two important but competing interests." G.G.'s interest is performing "life's most basic and routine functions" in the school restroom in an environment consistent with G.G.'s gender identity. On the other hand, the School Board has an interest in "providing its students with a safe and comfortable environment for performing these same

life functions consistent with society's long-held tradition of performing such functions in sex-segregated spaces based on biological or birth sex." *Johnston*, 97 F. Supp. 3d at 668. In analyzing these issues, *Johnston* held that segregating "bathroom and locker room facilities on the basis of birth sex is substantially related to a sufficiently important governmental interest." *Id*. at 669. That conclusion is a correct statement of the law and should be followed in this case.

This Circuit has recognized a right to bodily privacy. *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981) ("Most people, however, have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.") Parents have an interest in the safety of their children, and children have a strong privacy interest of their own. *United States v. Virginia*, 518 U.S. 515, 551 (1996) (recognizing that admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex); *Doe v. Luzerne Cnty.*, 660 F.3d 169, 177 (3d Cir. 2011) (recognizing right of privacy from involuntary exposure of body particularly while in the presence of members of the opposite sex); *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005) ("Students of course have a significant privacy interest in their unclothed bodies.").

The School Board has a responsibility to its students to ensure their privacy while engaging in personal bathroom functions, disrobing, dressing, and showering outside of the presence of members of the opposite sex. This is particularly true in an environment where children are still developing, both emotionally and physically. *See*, *e.g.*, *Burns v. Gagnon*, 727 S.E.2d 634, 643 (Va. 2012) (school administrators have a responsibility "to supervise and ensure that students could have an education in an atmosphere conducive to learning, free of disruption, and threat to person.").

As *Johnston* recognized, the context of this dispute is important. Here, the School Board is balancing the needs, interests and rights of children in kindergarten through twelfth grade. The right to privacy for students strongly supports maintaining sex-segregated bathrooms and locker rooms.

The School Board is not unsympathetic to G.G.'s recent identification as a boy, but G.G.'s identification does not alter the biological and anatomical differences between G.G. and other male students, nor does it erase the biological and anatomical differences between a male student who identifies as a female and other female students. G.G. cannot reconcile these facts with the position that the School Board does not have a legitimate interest in protecting other students' privacy.

The School Board has taken both G.G.'s interests and the interests of its other students into consideration and developed a policy that attempts to accommodate the best interests of all of its students. In doing so, the School Board bolstered these privacy rights by providing single-stall restrooms for any student to use. Accordingly, there is not only a rational basis, but a substantially related basis for the School Board's policy requiring students to use the restroom and locker room associated with their biological sex, or to use a single-stall restroom of their choice.

## III. G.G. is not likely to succeed on the merits because the School Board's policy does not violate Title IX.

Likelihood of success on the merits is the first element of the preliminary injunction test. G.G. pleaded two claims. Point II addressed his Equal Protection claim. Here Point III addresses his Title IX claim. The School Board is arguing that in the trial court G.G. will probably lose on *both* claims and therefore has no likelihood of success on the merits.

The School Board's policy does not violate Title IX. Title IX prohibits discrimination "on the basis of sex" in educational programs. 20 U.S.C. § 1681(a). As discussed in detail under the Equal Protection argument, courts have not permitted discrimination claims to proceed based upon transgender status alone. Instead, all of the cases have been premised on some form of discrimination based on the plaintiff's behaviors, mannerisms or appearance, and those plaintiffs have sought protection on the basis of their biological sex. *Johnston* addressed this precise issue as well, and held that being transgender itself is not a protected characteristic under Title IX. As the Court noted, the exclusion of gender identity from the language of Title IX is not an issue for the court to remedy, but one within the province of Congress to identify the classifications which are statutorily prohibited. *Id*. at 75-77.

This is consistent with the plain language of the statute and the legislative history of Title IX. Title IX was enacted in order to open up educational opportunities for girls and women in education and to address discrimination toward women. *See, e.g.*, 117 Cong. Rec. 30,155-30,158 (August 5, 1971); 117 Cong. Rec. 39,248-39,261 (November 4, 1971); *Johnston*, 97 F. Supp. 3d at 677. The legislative history, statutory language and implementing regulations do not refer to gender identity or transgender individuals in the enforcement scheme.

## IV. G.G. cannot satisfy the remaining factors justifying the imposition of a preliminary injunction.

Point IV addresses the other elements of the preliminary injunction test.

### *A. The balance of hardships does not tip in G.G.'s favor, and G.G. is not likely to suffer irreparable harm.*

Subpoint A argues that G.G. hasn't satisfied the second element (threatened with irreparable harm) and the third element (balance of hardships).

The District Court did not abuse its discretion in finding that G.G. did not submit sufficient evidence to establish that the balance of hardships weigh in his favor. J.A, 154. As discussed under the Equal Protection claim, the School Board is charged with the responsibility to care and protect minor children while they are in school. *Linnon v. Commonwealth*, 752 S.E.2d 822, 826 (Va. 2014). Those children have a right to privacy protected by the Constitution. *Lee*, 641 F.2d at 1119. That right, as explained above, is of paramount concern for the School Board, and outweighs the interests of G.G. This is particularly true where G.G. seeks to impose an injunction on the School Board before the difficult issues associated with G.G.'s claims are litigated, before the Court has considered whether G.G. even has a viable legal claim, and in direct contradiction to the holding of the only Federal Court to have actually considered the issues raised in G.G.'s Complaint.

As the District Court correctly recognized, the School Board's strong interest in protecting student privacy outweighs the claims of hardship by

G.G. Moreover, the School Board, and school officials, have recognized and accepted G.G. as a transgender individual. They are supporting G.G., have changed his official school records, refer to G.G. with male pronouns, and are allowing him to participate in his school educational opportunities as a transgender male. The School Board has also provided three single-stall bathrooms for G.G. and any other student to use. G.G. can also use the bathroom in the nurse's office. G.G. has voluntarily chosen not to use the locker room at the high school. This evidence discounts the notion that G.G. will suffer irreparable harm if a preliminary injunction is not granted. The competing hardship is to the remaining students in the school system. Their safety and privacy interests will go unprotected if an injunction is entered until the issue is resolved on the merits.

G.G.'s assertions concerning the Court's consideration of Dr. Ettner's declaration and G.G.'s declaration miss the point. Dr. Ettner saw G.G. on one occasion. In the declaration, Dr. Ettner devotes only three paragraphs to G.G. specifically. J.A, 41-42. Those three paragraphs do not divulge any particular facts related to G.G. While Dr. Ettner opines that G.G. is suffering emotional distress, Dr. Ettner does not offer an opinion differentiating between the distress that G.G. may suffer by not using the boy's bathroom during the course of this ligation and the distress that he has apparently been living with since age 12. J.A, 29. Similarly, while G.G. asserts that his feelings of dysphoria, anxiety and distress increase when he uses the restroom at school, because he is reminded that everyone knows he is transgender, G.G. did not present evidence that those feelings would be lessened by using the boy's restroom. As the District Court rightly pointed out, there was no evidence presented from G.G.'s treating psychologist, nor was there any medical evidence presented in support of the preliminary injunction.

While G.G. disagrees with aspects of the District Court's opinion, a close review of that opinion shows that the District Court did consider in detail the evidence presented on the motion for a preliminary injunction. That opinion discredits the assertion that there was "clear error" in the Court's factual findings. In sum, G.G. did not present sufficient evidence to carry the burden required to impose a preliminary injunction on the School Board under the circumstances of this case.

***B. An injunction is not in the public interest.***

Subpoint B argues that G.G. hasn't satisfied the last element (public interest).

An injunction is not in the public interest, because the School Board's policy does not violate the Equal Protection Clause or Title IX, and the School Board is not discriminating against G.G. by maintaining separate sex-segregated bathrooms. As the District Court candidly pointed out, there are significant concerns with the precedent that would be set if the Court granted the Motion for Preliminary Injunction without full consideration of the case on the merits.

**CONCLUSION**

For the reasons stated above, this Court should affirm the District Court's Order denying G.G.'s Motion for Preliminary Injunction. This Court should

further affirm the District Court's Order granting the School Board's Motion to Dismiss the Title IX claim. Finally, this Court should direct the District Court to enter an Order granting the School Board's Motion to Dismiss the Equal Protection claim on remand.

**Gloucester County School Board**

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